No. 7343

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
Defendant and Appellant,

vs.

F. J. BAFFERT and A. S. LEON, co-partners, trading under the firm name of Baffert & Leon,
Plaintiffs and Appellees.

SOUTHERN PACIFIC COMPANY, et al.,
Defendants and Appellants,

vs.

WHEELER-PERRY COMPANY,
Plaintiff and Appellee.

APPELLANTS' OPENING BRIEF.

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STATEMENT OF THE CASE.

These appeals are prosecuted to reverse judgments rendered by the United States District Court for Arizona, in two actions at law brought in that Court, in which appellants were defendants, and appellees were plaintiffs. The two cases presented identical questions of law and fact, and were consolidated in the trial

Court for purposes of trial and decision (R. 123). They are here presented upon a consolidated record, and in this brief they will be treated as one.

The instant cases resemble, in many respects, No. 7341, *El Paso & Southwestern R. Co. v. Phelps-Dodge Merc. Co.,* and No. 7342, *Santa Maria Valley R. Co. v. Solomon-Wickersham Co.,* now pending before this Court upon appeals from judgments of the same District Court.

During the period between March 5, 1923, and May 1, 1928, plaintiffs[1] received at Tucson, Arizona, 41 carload shipments of sugar, which had moved from various points (Crockett, San Francisco, Oxnard and Betteravia) in California, upon which freight charges were assessed at the contemporaneous commodity rates. All but three of the shipments were delivered on or prior to September 15, 1925. Those three shipments were delivered during March, April, and May, 1928 (R. 37, 49-50).

On March 6, 1925, and February 6, 1926, plaintiffs, as complainants, filed complaints with the Interstate Commerce Commission in which they alleged that defendants' rates on sugar, in carloads, from various points in California, including those above-named, to Tucson, had been, and in future would be, unreasonable, in violation of Section 1 of the Interstate Commerce Act. The Commission was asked to determine what would have been or would be reasonable rates in lieu of those attacked, and to award reparation, both upon past shipments, and those moving *pendente*

1. Throughout this brief the parties are designated in the same manner as in the trial Court.

lite. On March 12, 1928, the Commission rendered its decision, covering those complaints as well as a number of others consolidated therewith, in which it declared, among other things, that the rates attacked had been unreasonable, and that reparation was due:

> *Traffic Bureau, Phoenix Chamber of Commerce, et al. v. A. T. & S. F. Ry. Co., et al.* (1928), 140 I. C. C. 171.

For convenience, this decision will be referred to herein as the *"Third Phoenix Case"*, adopting the designation used in prior cases before this Court, which arose out of the same decision, particularly:

> *A. T. & S. F. Ry. Co. v. Arizona Grocery Company* (1931),[2] 49 F. (2d) 563, (*affirmed,* 1932) 284 U. S. 370;
>
> *Arizona Wholesale Grocery Co. v. S. P. Co.* (Jan. 24, 1934),[3] 68 F. (2d) 601.

A copy of the opinion, and the orders for the future, entered in the *Third Phoenix Case* is annexed as Exhibit A to the complaint in No. L-738-Phoenix (R. 8-36). A copy was also received in evidence at the trial, as Plaintiffs' Exhibit 1 (R. 123-124).

Following the decision in the *Third Phoenix Case,* and as directed therein, plaintiffs compiled and submitted to the Commission tabular statements (called "Rule V Statements") setting forth essential information as to the shipments upon which reparation was claimed. In due course, the Commission entered supplementary orders (Sept. 7, 1929, and April 13,

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2. For convenience, this case is referred to hereinafter as the *"Arizona Case"*.

3. For convenience, this case is referred to hereinafter as the *"Wholesale Grocery Case"*.

1931), in evidence as Plaintiffs' Exhibits 2 and 3 (R. 124) authorizing and directing the payment of reparation, in specified amounts, to plaintiffs and various other shippers (R. 40-41, 52-53). A copy of the Rule V statement covering the Baffert & Leon shipments appears as Exhibit B to the complaint in No. L-738-Phoenix (R. 37), and was by stipulation considered in evidence (R. 125). A copy of the Rule V statement covering the Wheeler-Perry shipments is attached as Exhibit A to the complaint in No. L-844-Phoenix, and was introduced as Plaintiffs' Exhibit 4 at the trial (R. 125). Defendants declined to comply with the reparation orders (R. 92); and thereupon the instant suits were commenced, pursuant to Section 16(2) of the Interstate Commerce Act (49 U. S. C. 16-2).

The primary (but not the only) defense urged in these causes was and is the same as that successfully maintained in the *Arizona* and *Wholesale Grocery Cases,* supra: namely, that the rates and charges under attack conformed to a prior formal declaration by the Commission dealing with the same transportation services, and the attempted awards were therefore beyond the Commission's power. In order that the defendants' contention may be more readily understood, it is desirable at this point to review briefly the evolution of the rates which, as applied upon plaintiffs' shipments, were afterwards found unreasonable in the *Third Phoenix Case,* and made the subject of the awards here in suit.

On April 15, 1914, the Arizona Corporation Commission filed a complaint with the Interstate Com-

merce Commission, attacking as unreasonable the rates on sugar and syrup in straight and/or mixed carloads, from all producing points in California to all destinations in Arizona. The proceeding is reported as Docket 6806, *Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al.* (1915), 34 I. C. C. 158. A copy of the opinion and order was received in evidence at the trial, as Defendants' Exhibit A (R. 128-137). While Docket 6806 was pending, but before its final submission, the carriers defendant therein *voluntarily* reduced their rates from substantially all California producing points to all important destinations in Arizona, including Tucson. These reductions included the publication of lower rates than previously in effect, and the initiation of rates upon still lower levels, subject to an increased minimum carload weight of 60,000 pounds. (The minimum under the previous rates had been 36,000 pounds.) As thus established, the reduced rate to Tucson, subject to the 60,000-pound minimum, became 55 cents[4] (R. 132; Defendants' Exhibit E: R. 200-201). The Commission, in deciding Docket 6806, took notice of these reductions, and concluded (R. 135) that the rates attacked had not been shown unreasonable to any greater extent than the amounts of such reductions: i. e., that the rates as thus reduced were reasonable for the future. In conformity with that finding, the 55-cent rate to Tucson, as made effective during the pendency of Docket 6806, was continued in effect without any change until June 25, 1918.

4. Unless otherwise specified, all rates herein are stated in amounts per hundred pounds.

In the meantime, on December 29, 1917, possession, control, and operation of the railroad properties of the defendant carriers was assumed by the President, acting through the Director-General of Railroads as head of the United States Railroad Administration, all as provided by the Federal Control Act, 40 Stat. L. 451 (R. 205). On June 25, 1918, pursuant to General Order No. 28 of the Director-General, the 55-cent rate, together with all other rates generally throughout the United States, was advanced 25 per cent. On November 25, 1919, that 25 per cent advance was superseded by a flat advance of 22 cents (Defendants' Exhibits E, F, and G: R. 200-201, 205-213). This change was likewise pursuant to order of the Director-General.

On March 1, 1920, defendants resumed possession, control and operation of their properties, upon the termination of Federal Control. The rate then in effect (77 cents), which was the rate in effect on May 25, 1915, subject only to the changes made by the Director-General during Federal Control, was continued in effect without any change until August 26, 1920.

On that date, the rate was advanced 25 per cent (to 96½ cents), in conformity with the Commission's decision in:

Ex Parte 74, Increased Rates 1920, 58 I. C. C. 220.

The changes then made applied to all rates throughout the country, both on sugar and other commodities generally, although the percentages of advance were not uniform.

On August 22, 1921, the rate was *voluntarily* reduced from 96½ to 96 cents. On July 1, 1922, it was further reduced 10 per cent (to 86½ cents), in accordance with the recommendations made by the Commission in:

Reduced Rates 1922, 68 I. C. C. 676.

This change was similar to the advances of 1918 and 1920, in that it was general in character, practically all rates throughout the country having been affected thereby.

On January 11, 1924, a further voluntary reduction was made, to 84 cents. On October 27, 1925, the rate was further reduced to 75 cents: the Commission having, in Docket 14,140, *Solomon Wickersham Co. v. S. M. V. R. Co., et al.,* 101 I. C. C. 667, prescribed that rate to Bowie, a more distant point on the same line. Docket 14,140 was subsequently reopened (in January, 1926), and re-decided in conjunction with the *Third Phoenix Case;* but the order therein was not suspended pending such reconsideration. The 75-cent rate therefore continued in effect without further change until June 11, 1928, the effective date of the rates prescribed for the future in the *Third Phoenix Case.* All of the aforementioned changes are shown in detail in the defendants' exhibit reciting the history of the rates (Exhibit E: R. 200-201).

As shown by the Rule V statements, the rates of 86½ cents, 84 cents, and 75 cents, which were successively in effect during the period between July 1, 1922, and June 11, 1928, were the rates charged

on the shipments upon which plaintiffs seek reparation. The rates found reasonable for reparation purposes, in lieu of those charged, are 77 cents from northern California points (San Francisco and Crockett), and 73 cents from southern California points (Betteravia and Oxnard) (R. 26). It may be noted that the 77-cent rate thus prescribed *exceeds,* by two cents, the rate actually in effect from Northern California points following October 27, 1925, under the order in Docket 14,140. The Commission did not, however, attempt to make the 77-cent rate retroactive, so as to increase charges collected under the 75-cent rate. In awarding reparation, it allowed no off-setting credit in defendants' favor, on account of this difference between the rate charged and that afterwards found reasonable.

The changes in the rate to Tucson, during the period from June 27, 1921, to February 24, 1925, were precisely the same as those made in the rate from the same origins to Phoenix during the same period, as recited in the opinions of the Supreme Court (284 U. S., at pp. 381, 382) and this Court (49 F. (2d), at p. 565), in the *Arizona Case.*

The instant suits were consolidated for trial, and were tried by the Court sitting without a jury, trial by jury having been duly waived in writing (R. 68-69). At the trial defendants advanced the following contentions:

1. The rates on sugar from the points of origin of the plaintiffs' shipments to Tucson were approved

and declared to be reasonable by the Commission, by the decision in Docket 6806.

2. The rates approved as reasonable in Docket 6806 were continued in effect thereafter, throughout the period of movement of the shipments upon which reparation is sought, subject (1) to certain general changes, including two or more advances and one reduction, authorized and/or required by the United States, acting through the Director-General and the Commission, and (2) to certain incidental reductions by defendants.

3. The rates assessed upon the shipments upon which reparation is sought were, in all instances, equal to or less than the rates approved as reasonable by the Commission in Docket 6806, as modified by the above-mentioned orders or recommendations of the Director-General and the Commission.

4. The Commission was without jurisdiction to make any valid order awarding reparation upon plaintiffs' shipments moving under rates equal to or less than those approved in Docket 6806, as subsequently modified.

5. Apart from the question of the Commission's jurisdiction, the finding in the *Third Phoenix Case,* upon which the reparation orders in suit are founded, is legally inadequate to sustain those orders, and affords no satisfactory evidence that the rates and charges against which reparation is sought were unreasonable. The balance of plaintiffs' evidentiary showing is either incompetent, or otherwise inadequate to support the complaints.

6. The defendants' affirmative showing demonstrates that the rates charged were not unreasonable. This showing is ample to overcome whatever *prima facie* evidentiary value may reside in plaintiffs' evidence.

On the other hand, plaintiffs contended that, even if the Commission had, in Docket 6806, approved as reasonable the rates then before it, the subsequent changes so modified the rates as to destroy the effect of the Commission's prior approval, and thus rendered the rates as charged subject to the Commission's reparation jurisdiction; that the Commission's finding with respect to reparation, in the *Third Phoenix Case,* was jurisdictionally made and therefore valid, and that the reparation orders in suit, which are founded thereon, are likewise valid; that the finding and orders constitute *prima facie* evidence of the unreasonableness of the rates charged, and of the fact and amount of the damage alleged to have been incurred by plaintiffs; that this *prima facie* showing was further supported by supplementary testimony offered by plaintiffs; and that defendants' showing failed entirely to overcome plaintiffs' *prima facie* case.

Although the trial Court rendered no formal opinion, it apparently adopted the views advanced by plaintiffs. After making special findings of fact and conclusions of law, largely as proposed by plaintiffs, and rejecting those requested by defendants, it rendered judgments as demanded in the complaints, including interest, and an allowance of 20 per cent of the principal plus interest in each case, on account of

attorneys' fees. The cases now come to this Court upon appeals from those judgments.

ASSIGNMENTS OF ERROR.

The errors asserted and relied upon by defendants and appellants are as follows (R. 276-315):

1. The Court erred in overruling defendants' objection to the admission in evidence of Plaintiffs' Exhibit 5, and in receiving said Exhibit 5 in evidence, and erred further in overruling defendants' motion to strike said Exhibit 5 from the record (Assignments of Error Nos. 3, 4).

2. The Court erred in failing to find and conclude that the rates on sugar, in carloads, from the California points of origin of the plaintiffs' shipments to Tucson were approved as just and reasonable by the Commission in its decision in Docket 6806; that the rates so approved were continued in effect, subject only to intervening modifications authorized and/or required by the United States, acting through the Director-General of Railroads, as the agent of the President, and through said Commission, and to certain voluntary reductions made by the defendants, following their approval by the Commission, and throughout the period of movement of plaintiffs' shipments upon which reparation is sought; and that the rates charged and applied upon plaintiffs' shipments were in all instances equal to, or less than, those approved and declared to be reasonable by the Commission in said Docket 6806, as modified only by the

intervening authorized general modifications just referred to (Assignments of Error Nos. 10, 11, 12, 13, and 28).

3. The Court erred in failing to find and conclude that the purported finding, and the orders awarding reparation to plaintiffs made and issued by the Commission on September 7, 1929, and April 13, 1931, upon which the plaintiffs' suits are founded, were and are void and of no effect, for the reason that said Commission was and is without jurisdiction, under the law, to make said orders, or any orders, purporting to award reparation for the collection of charges based upon rates duly published and maintained by defendants pursuant to and in conformity with previous lawful, valid, formal findings; and in finding and concluding that said purported finding and orders for the payment of reparation were and are legal, valid and binding, and within the jurisdiction conferred by law upon said Commission (Assignments of Error Nos. 18, 22, 25, 29, and 33).

4. The Court erred in finding and concluding that the rates and charges assessed upon plaintiffs' said shipments were unreasonable, and in violation of the Interstate Commerce Act; and in failing to find that, as measured by rates approved or prescribed by the Commission itself, and thus conclusively established as reasonable, from and to the same and closely related points of origin and destination, said rates as charged were in all respects just and reasonable, and in full conformity with all requirements of said Act (Assignments of Error Nos. 14, 15, 16, 17, 19, 20, 26, and 30).

5. The Court erred in failing to find and conclude that plaintiffs have failed entirely to establish the causes of action alleged in their complaints, or either of them, or any cause of action whatever against the defendants, or either of them; and in failing to grant defendants' motion for a nonsuit against plaintiffs in each cause, and for the entry of judgments in favor of defendants, duly made at the conclusion of plaintiffs' testimony in chief; and in failing to grant defendants' further motion for judgments in favor of defendants and against plaintiffs, upon the pleadings and the evidence, duly made at the conclusion of the taking of the testimony at the trial (Assignments of Error Nos. 1, 5, and 30).

6. The Court erred in finding that plaintiffs have been damaged, by reason of the assessment of the rates and charges applied and collected upon plaintiffs' said shipments, and the refusal of defendants to pay reparation to plaintiffs as awarded by the Commission, and in concluding that plaintiffs are entitled to judgments against defendants, and that defendants are indebted to plaintiffs as follows: the defendant, Southern Pacific Company to plaintiffs F. J. Baffert and A. S. Leon, in the sum of $726.28, together with interest amounting to the sum of $191.95, together with attorney's fees amounting to the sum of $222.82; and the defendant, Southern Pacific Company, to plaintiff Wheeler-Perry Company in the amount of $1090.09, together with interest amounting to the sum of $581.48, together with attorney's fees amounting to the sum of $359.98; and defendant Santa

Maria Valley Railroad Company, to plaintiff Wheeler-Perry Company, in the amount of $81.60, together with interest in the sum of $46.74, together with attorney's fees in the sum of $25.68; together with other lawful costs; and in refusing to find and conclude that defendants are entitled to judgments in said causes, and that plaintiffs take nothing by their actions herein (Assignments of Error Nos. 23, 27, and 31).

7. The Court erred in finding that plaintiffs were compelled to employ attorneys to prosecute and maintain said actions, and that 20 per cent of the total amount due, including principal and interest, is reasonable to be allowed plaintiffs as attorney's fees; and in refusing to find and conclude that plaintiffs are not entitled to recover any amount whatsoever, as and for fees of their attorneys in these causes (Assignments of Error Nos. 6, 24, and 31).

8. The Court erred in rendering and entering judgments, upon the facts as found by the Court, in favor of plaintiffs and against defendants, and in refusing to render and enter judgments upon the facts found, in favor of defendants; and erred further in failing to render and enter judgments in favor of defendants and against plaintiffs, predicated upon the findings of fact and conclusions of law proposed and requested by defendants, and upon the undisputed facts appearing in the evidence, upon which the said proposed findings and conclusions of defendants were and are predicated (Assignments of Error Nos. 32 and 33).

BRIEF OF ARGUMENT.

I. The Commission was without jurisdiction to make the finding and orders upon which the instant suits are based.

These suits cannot be maintained, except upon the basis of a valid reparation finding, and valid orders by the Commission.

Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426;

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412;

Lewis-Simas-Jones v. S. P. Co. (1931), 283 U. S. 654.

1. *The Commission, by its decision in Docket 6806, approved as reasonable the rates on sugar in carloads from and to the points involved.*

The finding in Docket 6806 has already been referred to, and in effect construed, by this Court.

Arizona Wholesale Grocery Co. v. S. P. Co. (1934), 68 F. (2d) 601.

Findings made by the Commission in other cases, similar in language and import to that made in Docket 6806, have been construed both as approvals of the rates charged, and as findings of reasonableness.

Arizona Wholesale Grocery Co. v. S. P. Co., supra;

U. S. v. New River Co. (1924), 265 U. S. 533 (537, 541);

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515 (519, 520, 524);

Edward Hines Trustees v. U. S. (1923), 263 U. S. 143 (146);

Turner Lumber Co. v. C. M. & St. P. Ry. Co. (1926), 271 U. S. 259 (261, 263);

Alton R. Co. v. U. S. (1932), 287 U. S. 229 (231, 237);

Hohenberg v. L. & N. R. Co. (C. C. A. 5th, 1931), 46 F. (2d) 952 (954).

The essential issue presented in Docket 6806, and therefore necessarily decided therein, was whether the rates on sugar from California points to Arizona destinations, particularly Tucson, were and in future would be reasonable.

Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98 (105);

A. T. & S. F. Ry. Co. v. U. S. (1914), 232 U. S. 199 (221);

Defendants' Exhibit A (R. 128, 129, 132, 133).

2. *The rates charged on the shipments here involved were in all instances equal to or less than the rate to Tucson approved in Docket 6806, as thereafter modified by the authorized general changes.*

Plaintiffs' Exhibit 1 (R. 13-16);

Defendants' Exhibit E (R. 200-201, 212-214).

The changes made during the period of Federal Control were accomplished in response to orders of the Director-General, then exercising powers conferred by the Federal Control Act, and acting as the authorized agent of the President.

Northern Pacific Ry. Co. v. North Dakota (1919), 250 U. S. 135 (148);

Mo. Pac. R. Co. v. Ault (1921), 256 U. S. 554 (557);

Dupont Co. v. Davis (1924), 264 U. S. 456 (462).

The general changes of 1920 and 1922 were in response to decisions of the Commission itself.

Increased Rates 1920, 58 I. C. C. 220;

Reduced Rates 1922, 68 I. C. C. 676.

3. *Under the rule of the controlling decisions, the reparation order in suit is void and unenforceable.*

Arizona Grocery Co. v. A. T. & S. F. Ry. Co. (1932), 284 U. S. 370;

Arizona Wholesale Grocery Co. v. S. P. Co., supra.

4. *The decision of the Circuit Court of Appeals for the Fifth Circuit, in the Eagle Case, is of no value as an authority to support the trial Court's decision.*

(a) *The intervening general changes did not operate to deprive the rates charged of their status as Commission-approved rates.*

The general changes of 1918, 1920, and 1922, were of precisely the same character.

Brimstone R. & C. Co. v. U. S. (1924), 276 U. S. 104.

In the *Arizona Case* the Supreme Court, and this Court, in effect held that the intervening change of 1922 did not operate to deprive the rate there under

consideration of its Commission-made status, although that rate had been prescribed prior to 1922, and had been modified by that general change. The decision in the *Eagle Case:*

Eagle Cotton Oil Co. v. A. G. S. R. Co. (C. C. A. 5th, 1931), 51 F. (2d) 443,

to the extent that it relies upon a contrary theory, is in conflict with the *Arizona Case,* and therefore not a controlling precedent. It is also in conflict with this Court's decision in the *Wholesale Grocery Case,* and the decision of the United States District Court for Arizona, in:

E. P. & S. W. R. Co. v. Arizona Corporation Commission (1931), 51 F. (2d) 573.

(b) *The effectiveness of the finding in Docket 6806, approving the rates, was not destroyed by the lapse of the time intervening prior to the charging of the assailed rates.*

The decision in the *Eagle Case* proceeds upon the theory that an *order* of the Commission, made in 1915, expired in two years. Defendants here rely upon a *finding* made by the Commission in 1915, in connection with which no order for the future was entered. The findings of the Commission are distinct from its orders.

Interstate Commerce Act, Sections 14, 15, 16 (1);

U. S. v. A. B. & C. R. Co. (1931), 282 U. S. 522 (527);

Brady v. Interstate Commerce Commission (1930), 43 F. (2d) 847 (850) (affirmed: 283 U. S. 804);

American Sugar Refining Co. v. D. L. & W. R. Co. (C. C. A. 3rd, 1913); 207 Fed. 733 (740-741);

C. B. & Q. R. Co. v. Merriam (C. C. A. 8th, 1922), 297 Fed. 1 (3-5).

The two-year limitation did not affect the Commission's *findings,* made prior to 1920.

Southern Pacific Co. v. Interstate Commerce Commission (1911), 219 U. S. 433 (452);

Southern Pacific Terminal Co. v. Interstate Commerce Commission (1911), 219 U. S. 498 (515).

Findings of the Commission, considered apart from its orders, themselves possess sufficient force to constitute a determination of the matters with which they deal.

Western Paper Makers' Chemical Co. v. U. S. (1926), 271 U. S. 268 (270);

Virginian R. Co. v. U. S. (1926), 272 U. S. 658 (665);

Owensboro Wheel Co. v. Director General (1922), 69 I. C. C. 503 (506);

Fels & Co. v. Penn. R. Co. (1912), 23 I. C. C. 483 (486-487).

A finding which determines the reasonableness of a rate *for the future* is conclusive until thereafter changed.

Interstate Commerce Commission v. Union Pacific R. Co. (1912), 222 U. S. 541 (547, 548);

Western Paper Makers' Chemical Co. v. U. S., supra;

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294 (311);

Virginian R. Co. v. U. S., supra.

The decision in the *Arizona Case* follows and affirms that principle; but it appears to have been overlooked, if not entirely disregarded, in the *Eagle Case.*

The denial of certiorari in the *Eagle Case* imports no expression of opinion by the Supreme Court on the merits, and does not operate at all as an affirmance.

U. S. v. Carver (1921), 260 U. S. 482 (490);

Hamilton Shoe Co. v. Wolf Bros. (1916), 240 U. S. 251 (258).

II. The rates and charges assessed upon the shipments upon which reparation is claimed were not unreasonable.

1. *The substantive issue of the reasonableness of the rates as charged was properly presented for determination by the trial Court. That determination may be reviewed by this Court upon this appeal.*

The issue of the reasonableness of the rates is duly presented by the pleadings.

Complaint in No. L-738: Paragraphs III, VIII (R. 3-4, 6-7);

Complaint in No. L-844: Paragraphs IV, IX (R. 44, 47);

Amended Answer in No. L-738: Paragraphs II, VII (R. 58-59, 61-62);

Answer in No. L-844: Paragraphs II, VII (R. 64, 66-67).

In this suit the finding and order of the Commission are merely *prima facie* evidence, and are not conclusive upon the Court or the defendants.

Interstate Commerce Act, Section 16(2);

Meeker v. Lehigh Valley R. Co., supra;

Spiller v. A. T. & S. F. Ry. Co. (1920), 253 U. S. 117 (131-132);

Lewis-Simas-Jones v. S. P. Co., supra;

B. & O. R. Co. v. Brady (1933), 288 U. S. 448 (457, 458);

C. N. O. & T. P. Ry. Co. v. I. C. C. (1896), 162 U. S. 184 (196);

Pittsburgh & W. Va. Ry. Co. v. U. S. (1924), 6 F. (2d) 646 (648);

Brady v. I. C. C., supra;

Blair v. Cleveland, C. C. & St. L. Ry. Co. (1931), 45 F. (2d) 792;

Atlantic Coast Line R. Co. v. Smith Bros. (C. C. A. 5th, 1933), 63 F. (2d) 747 (748) (certiorari denied: 289 U. S. 761);

Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932), 56 F. (2d) 1010 (1018).

The question was properly saved for review upon this appeal by exceptions to the rulings of the trial Court, which rejected defendants' proposed findings

and adopted those proposed by plaintiff, and denied defendants' motions for a nonsuit and for judgment on the evidence (R. 126-127, 224, 247, 249).

Maryland Casualty Co. v. Jones (1929), 279 U. S. 792;

Fleischmann Co. v. U. S. (1926), 270 U. S. 349 (356);

Southern Ry. Co. v. Eichler, supra.

2. *Plaintiffs' evidence is wholly inadequate, as a matter of law, to support the trial Court's finding and conclusion that the rates and charges in issue were unreasonable.*

(a) *The Commission's finding in the Third Phoenix Case is partially invalid, under various Court decisions, and therefore incompetent and inconsistent in its entirety.*

(1) *The reparation finding is invalid and incompetent because based upon a demonstrated misconception of law.*

Arizona Grocery Co. v. A. T. & S. F. Ry. Co., supra;

Arizona Wholesale Grocery Co. v. S. P. Co., supra;

T. F. Miller Co. v. A. T. & S. F. Ry. Co. (U. S. D. C. Arizona, April 15, 1933).

(2) *The enforcement of the reparation finding and orders would create unlawful discriminations. The finding and orders are therefore invalid, and of no force as evidence to support plaintiffs' contentions.*

Discriminations may be accomplished just as effectively by the compulsory refund of a portion of the charges collected for one of two equivalent or similar services, but not the other, as by the initial charging of different amounts.

Wight v. U. S. (1897), 167 U. S. 512;

Penn. R. Co. v. International Coal Co. (1913), 230 U. S. 184;

Mitchell Coal Co. v. Penn. R. Co. (1913), 230 U. S. 247;

Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., supra;

Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662;

Union Pac. Ry. Co. v. Goodridge (1893), 149 U. S. 680.

The enforcement of the reparation finding and orders here in suit would create again discriminations exactly similar to those previously condemned by the Commission itself, and would thus defeat the Act's basic purpose: namely, to do away with discriminations and inequalities.

First Phoenix Case (1921), 62 I. C. C. 412 (Defendants' Exhibit B: R. 138-149);

New York, N. H. & H. R. Co. v. I. C. C. (1906), 200 U. S. 361 (369);

United States v. Union Stock Yard (1912), 226 U. S. 286 (307, 309).

Discriminations thus declared to be unlawful would not become clothed with legality simply because due to the enforcement of orders of the Commission rather

than the carriers' voluntary acts. "What the carrier may not lawfully do, the Commission may not compel."

Texas and Pacific Ry. Co. v. U. S. (1933), 289 U. S. 627 (637);

S. P. Co. v. Interstate Commerce Commission, supra;

Interstate Commerce Commission v. Diffenbaugh (1911), 222 U. S. 42 (46);

Ellis v. Interstate Commerce Commission (1916), 237 U. S. 434 (445);

U. S. v. Illinois Central R. Co., supra;

Anchor Coal Co. v. U. S. (1927), 25 F. (2d) 462 (471-472).

(3) *The acceptance of the reparation finding as valid prima facie evidence fails to give any proper effect to the controlling decisions in the Arizona and Wholesale Grocery Cases.*

The decision in the *Arizona Case* determined that the 96½-cent rate to Phoenix prescribed in the *First Phoenix Case* in 1921 was the conclusive measure of a reasonable rate to Phoenix as long as the Commission's order continued in effect.

Arizona Grocery Co. v. A. T. & S. F. Ry. Co., supra (284 U. S., p. 383).

The decision in the *Wholesale Grocery Case* applied the same principle to the rates to Globe and Safford approved by the Commission in the *Graham Case.* The same principle applies in the case of the rates to Clarkdale and Douglas, which were also approved by

the Commission. The rates thus prescribed or approved constituted conclusive measures of reasonable rates for the transportation services to Tucson, which should have been followed by the trial Court.

(b) *The showing attempted by plaintiffs, apart from the reparation finding and orders in the Third Phoenix Case, was largely incompetent and in any event wholly inadequate to support the trial Court's findings and judgments.*

Plaintiffs' Exhibit 5 was incompetent because not prepared by the witness through whom it was introduced (R. 223). In any event, it was nothing but a reproduction of a part of the opinion in the *Third Phoenix Case* (R. 25, 26), in evidence as Plaintiffs' Exhibit 1. It was therefore improperly admitted as rebuttal testimony.

Wigmore on Evidence, 4th ed., Vol. III, Sect. 1873;

Revised Code of Arizona, 1928, Sect. 3807;

24 *Cal. Juris.* 764-765.

The exhibit is based upon a completely erroneous assumption (R. 21, 216, 223).

3. *Defendants' evidence demonstrates conclusively that the rates as charged were not unreasonable.*

Defendants' showing compares the rates charged with the prescribed or approved rates to Phoenix, Globe, Safford and Douglas.

Defendants' Exhibits B, C and D (R. 138-197);

Defendants' Exhibit F (R. 202-203; 212-217).

These comparisons with Commission-made or approved rates constitute the best possible tests of the reasonableness of the rates charged.

Blackman, et al. v. A. C. & Y. R. Co., et al. (1918), 49 I. C. C. 649 (654);

Montgomery v. A. & S. Ry. Co., et al. (1928), 147 I. C. C. 415 (418);

Federated Metals Corp. v. Central R. R. Co. (1927), 126 I. C. C. 703 (709);

Illinois Electric Co. v. C. B. & Q. R. Co. (1928), 140 I. C. C. 63 (65);

Western Paper Makers' Chemical Co. v. U. S., supra;

Montrose Oil Refining Co. v. St. L. & S. F. Ry. Co. (1927), 25 F. (2d) 750 (752, 753).

These comparisons, being with rates conclusively established as just and reasonable, afford evidence ample to overcome any *prima facie* case made out in plaintiffs' favor by the reparation finding and orders.

Atlantic Coast Line R. Co. v. Smith Bros., supra;

Southern Ry. Co. v. Eichler, supra.

ARGUMENT.

FOREWORD.

Two major questions are presented by this appeal.

First, there is the primary question of law, whether the trial Court erred: (1) in failing to make findings, based upon defendants' undisputed showing, setting forth (a) the Commission's prior approval of the rate

on sugar from the California points of origin involved in the case to Tucson, (b) the subsequent maintenance of rates equal to or less than the rate so approved, subject only to general modifications initiated, required or recommended by the Director-General of Railroads and the Commission, and (c) the application and assessment of such rates upon plaintiffs' shipments; and (2) in failing to conclude that the reparation finding and orders in suit are in excess of the Commission's powers, and therefore void.

Second, there is the question, also one of law, whether, even if it be held that the Commission possessed *abstract* jurisdiction to award reparation upon the shipments in question, the trial Court erred: (1) in failing to find and conclude that the Commission's finding relied upon by plaintiffs has been deprived of any value as *prima facie* evidence, by reason of controlling decisions of the Supreme Court, and of this Court, involving the same finding; and (2) in finding and concluding that said finding, as supplemented by plaintiffs' other testimony, is sufficient to overcome the evidentiary showing of the reasonableness of the rates charged, adduced by defendants.

I.

THE COMMISSION WAS WITHOUT JURISDICTION TO MAKE THE AWARDS UPON WHICH THE INSTANT SUITS ARE BASED.

In this argument we shall first discuss the primary question, whether the finding and reparation orders

in suit are void, because in excess of the jurisdiction conferred upon the Commission. It is clear that if they are void, the actions have no basis at all, and it becomes unnecessary to review the secondary issue outlined in the preceding statement. Controlling decisions of the Supreme Court have definitely established that a suit at law for the recovery of reparation (damages) for the charging of alleged unreasonable interstate rates cannot be maintained in any Court, unless the plaintiff has first made complaint before the Commission, and secured a definite finding and a formal order declaring the fact and amount of the reparation due and authorizing its payment.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426;

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412;

Lewis-Simas-Jones Co. v. S. P. Co. (1931), 283 U. S. 654.

Defendants' contention, upon the primary issue, is simply that, under the principles laid down in the *Arizona Case* and the *Wholesale Grocery Case,* as applied to the undisputed facts of the instant case, the awards are in excess of the Commission's jurisdiction, and therefore void. In the *Arizona Case,* this Court and the Supreme Court declared in substance that when the Commission, after hearing, has declared what is the maximum reasonable rate thereafter to be charged by a carrier, it may not subsequently subject a carrier which conformed to that declaration to the payment of reparation measured by the rate which the Commission later holds should have been estab-

lished: in other words, that carriers cannot be held in damages for having charged rates conforming to prior formal declarations of the Commission. In the *Wholesale Grocery Case,* this Court held that the principle of the *Arizona Case* applies to situations where the rates as charged are equal to, or less than, those previously *approved* by the Commission. In the following discussion, we shall show that the facts of the instant cases bring them within the rule of those decisions.

1. The Commission, by its decision in Docket 6806, approved as reasonable the rates on sugar, in carloads, from and to the points involved.

The finding made in Docket 6806 has been referred to in our statement of the case. So far as material here, it was as follows (R. 135):

> "Upon examination of all the evidence of record, we are of the opinion and find that the rates on sugar and syrup in straight carloads from points in California to points in Arizona in effect at the time of the hearing have not been shown to be unreasonable to a greater extent than the amounts of the reductions since made."

Under controlling decisions of this Court, and of the Supreme Court, this finding must be construed as an *approval* of the rates then in effect (i. e., the rates as reduced during the pendency of the proceeding), as reasonable for future application. Indeed, this very finding has already been so construed, at least inferentially, in this Court's recent decision in the *Wholesale Grocery Case.* In that opinion this Court,

after quoting a portion of the report in Docket 6806 including the above, cited a later decision of the Commission, in which it was declared that in Docket 6806, it had been held "that the sugar rates, in effect on and after November 15, 1914 (from California origins to Arizona destinations) were not shown to be unreasonable":

> *Graham, etc., Traffic Ass'n v. A. E. R. Co.* (1916), 40 I. C. C. 573 (576).

In the *Wholesale Grocery Case,* this Court also reviewed the finding of the Commission in the *Graham Case,* which was similar to that made in Docket 6806, and held it to be an approval of the rates under review. The *Graham Case* is reported as:

> *Graham & Gila Counties Traffic Ass'n v. A. E. R. Co.* (1923), 81 I. C. C. 134;

and is in evidence as Defendants' Exhibit D (R. 175-197). The finding reads as follows (R. 193):

> "As in *State of Idaho ex rel. v. Director General,* supra, the record in the instant case does not support a finding of unreasonableness."

In that case the Commission considered not only sugar rates, but also the class rates, and rates on various other commodities, from California origins to points on the Globe branch. This Court held that the quoted finding was, in effect, "a positive finding of a negative fact"; i. e., an approval of the reasonableness of the sugar rates and other rates then under review. The finding in Docket 6806 was fully as definite and positive as that made in the *Graham Case,* and should receive a similar construction.

In other cases, the Commission, in making findings with respect to the issues before it, has used language similar to, and in many instances less positive than that employed in Docket 6806; nevertheless the Supreme Court, and (in one case) the Circuit Court of Appeals for the Fifth Circuit, have construed such language as constituting definite findings that the challenged rates or practices were reasonable (or "not unreasonable"), and/or as positive approvals of the rates as reasonable.

In

U. S. v. New River Co. (1924), 265 U. S. 533,

the Supreme Court reviewed the Commission's decision in

Bell & Zoller Coal Co. v. B. & O. S. W. R. Co. (1922), 74 I. C. C. 433,

in which the Commission said:

> "The present facts considered, we do not conclude upon these records that the rule attacked ** * is in principle unreasonable or unduly prejudicial."

The Supreme Court said, of this finding (265 U. S., at p. 537):

> "December 11, 1922, it (the full Commission) reversed the findings of Division 5, and found that Rule 4 was not unreasonable or unduly prejudicial."

The Court said further (at p. 541) that the order was *"not merely negative"*, but *"clearly permitted and authorized"* the carriers to apply the challenged rule; and that it was plainly the intention and purpose of

the Commission that the challenged rule should be applied.

In

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515,

the Supreme Court reviewed the decision in

Swift Lumber Co. v. F. & G. R. Co. (1921), 61 I. C. C. 485,

in which the Commission had said:

> "We do not find that the rates on yellow pine * * * in effect subsequent to January 1, 1919, from Knoxo to the destinations in question were intrinsically unreasonable * * *."

The Supreme Court said (263 U. S., at p. 519):

> "The Commission found that the rates from Knoxo were not unreasonable."

Elsewhere in the opinion the Court further indicated the view that this statement should be considered equivalent to a finding that the attacked rates were reasonable. At page 520, the Court said that the rates from Knoxo "have been found to be inherently reasonable"; and at page 524, it said that "the Knoxo rate is inherently reasonable".

In

American Wholesale Lumber Co. v. Director General (1922), 66 I. C. C. 393,

the Commission said (407):

> "We find that conditions existing at the time warranted the establishment of the penalty charge, and that it was not unreasonable or otherwise unlawful."

The Supreme Court twice interpreted that finding as "a positive finding of a negative fact".

In

Edward Hines Trustees v. U. S. (1923), 263 U. S. 143,

the Supreme Court said (146):

> "After extensive hearings the Commission held that * * * the charge then imposed had not been shown to be unreasonable."

In

Turner Lumber Co. v. C. M. & St. P. Ry. Co. (1926), 271 U. S. 259,

the Court twice referred to the finding. At page 261 it said:

> "This penalty charge was attacked as unreasonable * * * in *American Wholesale Lumber Ass'n v. Director General,* 66 I. C. C. 393, and there held by the Interstate Commerce Commission to be neither unreasonable nor otherwise unlawful."

At page 263, the Court said:

> "The power to impose such charges, if reasonable, is clear. Those here in question have been found by the Commission to be reasonable."

In

Wheelock & Bierd v. A. C. & Y. Ry. Co. (1931), 179 I. C. C. 517,

the Commission said (523):

> "We find that the assailed divisions of the reshipping or proportional rates *have not been*

shown to be unjust, unreasonable, or otherwise unlawful as alleged" (emphasis ours).

In construing that finding the Supreme Court twice interpreted it as a positive finding, saying, in

Alton R. Co. v. U. S. (1932), 287 U. S. 229 (231, 237):

"It (the Commission) found that the divisions of the so-called reshipping rates *were not unjust, unreasonable* or otherwise unlawful.

"By their unauthorized action the connecting carriers forced the Alton to become the moving party before the Commission, with the result that *the Commission's approval* of the divisions effected by them was expressed in the form of a refusal to interfere" (emphasis ours).

In

Montgomery Cotton Exchange v. L. & N. R. Co. (1926), 112 I. C. C. 325,

the Commission made the following finding (333):

"Under the circumstances here presented we are of the opinion and find that the rates assailed were not unreasonable under Section 1."

On reconsideration of the same case the Commission said (118 I. C. C. 157, 158-159):

"With respect to the allegation of unreasonableness, we find upon reconsideration, no occasion for a modification of the conclusion in the former report that the evidence did not warrant a finding of unreasonableness. * * * We accordingly find that the applicable rates were not and are not unreasonable."

Substantially similar findings were again made upon a further hearing of the same case (153 I. C. C., at p. 402). Upon review of these expressions, the Circuit Court of Appeals for the Fifth Circuit said, in

Hohenberg v. L. & N. R. Co. (1931), 46 F. (2d) 952 (954) (certiorari denied, 284 U. S. 617):

> "The contention that the rate was unreasonable was dismissed by the Commission and the same was held to be fair and reasonable."

All of the foregoing authorities were referred to and relied upon by this Court, in the *Wholesale Grocery Case,* to support its interpretation of the Commission's finding in the *Graham Case.* They are equally pertinent to the instant case, and strongly support the interpretation for which defendants contend.

It is clear, from the text of the report in Docket 6806, that the sole essential issue there presented for the Commission's determination was the reasonableness of the rates under review. Both in the synopsis (R. 128), and the summary of the complaint, in the first paragraph of the opinion (R. 129), the Commission set forth that the complaint alleged that the rates on sugar and syrup, in straight and mixed carloads, from producing points in California to *all* destinations in Arizona (Tucson being specifically named: R. 132, 133) were unjust and unreasonable, and made it clear that no other issue was presented. Under controlling decisions, the Commission's conclusions were neces-

sarily addressed to and constituted a determination of that particular issue.

Interstate Commerce Commission v. Stickney (1909), 215 U. S. 98 (105);

A. T. & S. F. Ry. Co. v. U. S. (1914), 232 U. S. 199 (221).

We ask the Court to conclude, in conformity with its decision in the *Wholesale Grocery Case,* that the determination made in Docket 6806 is to be construed as an approval of the reasonableness of the rates then in effect, from California points of origin to Tucson, for the reasons: (a) the issue of the reasonableness of such rates from California points of origin to all points in Arizona, including particularly Tucson, was the essential issue presented and necessarily determined in Docket 6806; (b) the findings in Docket 6806 have previously been interpreted by this Court, in the manner for which we now contend; and (c) precisely or substantially similar findings, in other cases, have been construed by the Supreme Court, by this Court, and by the Circuit Court of Appeals for the Fifth Circuit, as findings of reasonableness, and as approvals of the rates or practices challenged.

Defendants duly submitted to the trial Court a proposed finding, setting forth the fact of the Commission's approval of the rate on sugar to Tucson in Docket 6806 (Defendants' Proposed Finding No. 9: R. 239). That finding was rejected in its entirety (R. 247). We ask this Court to conclude that the trial Court erred in that respect, and that such error requires reversal of the judgment.

2. **The rates charged on the shipments here involved were in all instances equal to or less than the rate to Tucson approved in Docket 6806, as thereafter modified by the authorized general changes.**

In our "Statement of the Case" we have set forth the various changes which affected the rates on sugar from California to Tucson, between May 25, 1915, the date of the decision in Docket 6806, and February 27, 1923, the date of movement of the first shipment upon which reparation is sought. Those changes are all shown of record, particularly in Defendants' Exhibit E (R. 200-201, 212-214). A summary history of the rates also appears in Plaintiffs' Exhibit 1 (R. 13-16). The complete history is recited in Defendants' Proposed Findings Nos. 9 to 12, inclusive (R. 238-242), which, although founded upon *undisputed* testimony, were rejected by the trial Court (R. 247).

The only changes (except certain *voluntary* reductions which occurred *after* 1920), which affected the rates to Tucson, were accomplished either by the Director-General of Railroads, as head of the United States Railroad Administration, or in response to findings and orders of the Commission. These modifications of 1918, 1920, and 1922 were all of the same character, in that all rates, throughout the country, were at those times subjected to general modifications, which changes affected the sugar rates in common with substantially all other commodity rates. None of these changes was accomplished by the independent act of any of the defendants. The changes made by the Director-General were in reality imposed by the Federal Government, for the Director-General was

simply the authorized agent of the President, exercising powers conferred by Congress.

Northern Pac. Ry. Co. v. North Dakota (1919), 250 U. S. 135 (148);

Mo. Pac. R. Co. v. Ault (1921), 256 U. S. 554 (557);

Dupont Co. v. Davis (1924), 264 U. S. 456 (462).

We ask this Court to conclude that the trial Court erred in rejecting Defendants' Proposed Findings Nos. 9 to 12, inclusive, which set forth the history of the rate to Tucson approved in Docket 6806, and Defendants' Proposed Conclusion No. 1 (R. 247-248), which sets forth, in summary form, the approval of the rate in that decision, and the subsequent charging upon plaintiffs' shipments of rates equal to, or less than, the rate so approved, as modified by the intervening general changes and incidental voluntary reductions.

3. Under the rule of the controlling decisions, the reparation order in suit is void and unenforceable.

It having been definitely established that the rates as charged upon plaintiffs' shipments were in all instances equal to or less than that approved in Docket 6806, as modified by the intervening authorized general changes, it follows that the awards of reparation to plaintiffs are void and unenforceable, because in excess of the Commission's jurisdiction under the Interstate Commerce Act. The controlling principle of law was announced by the Supreme Court in the *Arizona Case,* with which this Court is fully familiar.

In substance, the Supreme Court there announced that a carrier which conformed to a formal declaration by the Commission, respecting the reasonableness of the rates to be charged by it, could not thereafter be required to pay reparation, measured by rates which the Commission in a subsequent proceeding, upon the same or a different record, thought proper to have been established. That principle was applied by this Court, in the *Wholesale Grocery Case,* to a situation not differing in any essential respect from that presented here. It was there held that when the Commission has *approved,* although not directly *prescribed,* a basis of rates to which the carrier thereafter conforms, it cannot subsequently award reparation against rates even lower than those theretofore approved.

Defendants proposed to the trial Court an appropriate conclusion of law (Defendants' Proposed Conclusion No. 2: R. 248), setting forth the invalidity of the reparation orders in suit. That conclusion, in common with the others proposed by defendants, was refused (R. 248). We ask this Court to hold that the trial Court erred in that respect.

4. The decision of the Circuit Court of Appeals for the Fifth Circuit, in the Eagle Case, is of no value as an authority to support the trial Court's decision.

(a) The intervening general changes did not operate to deprive the rates charged of their status as Commission-approved rates.

In presenting the instant case to the trial Court, counsel for plaintiffs relied largely upon the decision of the Circuit Court of Appeals for the Fifth Circuit in:

Eagle Cotton Oil Company v. A. G. S. R. Co. (1931), 51 F. (2d) 443.

It was asserted that that decision sustains the asserted validity of the reparation awards. We have no doubt that the trial Court was influenced thereby, and we anticipate that it will be again cited by plaintiffs' counsel upon this appeal. For that reason, we shall discuss the case at some length.

We assert that the *Eagle Case,* if in point at all, conflicts with the decisions of the Supreme Court in the *Arizona Case* and other cases; that it has been overruled, in effect, by the decision in the *Arizona Case;* and that consequently it is of no value as an authority.

The decision in the *Eagle Case* was rendered July 21, 1931. The Court reversed the decision (46 F. (2d) 1006) theretofore rendered by the District Court for the Southern District of Mississippi, in the same proceeding. The statement of facts, set forth in the majority opinion, shows that in 1915 the Commission, in passing upon a proposed increase in rates on coal, authorized the carriers to maintain thereafter a rate of $1.20 per ton from and to the points involved.

Coal and Coke Rates (1915), 35 I. C. C. 187.

In 1917, a general advance of 10 cents per ton was made, pursuant to the decision in:

Fifteen Per Cent Case (1917), 45 I. C. C. 303.

On June 25, 1918, the rate was further advanced, under authority of General Order No. 28 of the Director-General. The rate was likewise advanced in 1920, and reduced in 1922, in conformity with the

general changes authorized and required by the Commission in those years. The result was that following 1922, the rate became $2.03 per ton, as the evolution of the $1.20-rate approved in 1915. In

Eagle Cotton Oil Co. v. Southern Ry. Co. (1928), 140 I. C. C. 131,

the Commission undertook to award reparation against the $2.03-rate, to the extent that it exceeded $1.85 from certain mines, and $1.95 from certain others. The award was resisted, and the suit in the District Court followed.

Upon these facts the Circuit Court of Appeals held that the rate of $2.03 could not be regarded as having been fixed or prescribed by the Commission, and that there was no jurisdictional barrier to an award of reparation. The Court took notice of this Court's then recent decision in the *Arizona Case* (49 F. (2d) 563, dated March 23, 1931), but refused to apply the principle there announced.

It may be noted that one member of the Circuit Court (Circuit Judge Hutcheson) concurred in the judgment of reversal, but disagreed with the majority as to the principles involved. He declared that, in his opinion, the rate made the subject of the reparation order, while not specifically *prescribed* by the Commission, had received, speaking generally, the Commission's *approval* and *sanction*. He then disapproved the principle set forth in this Court's decision in the *Arizona Case,* adhering to the view that the Commission might properly award reparation against rates which it had previously prescribed or approved.

At the time of the *Eagle* decision, a petition for certiorari to review this Court's decision in the *Arizona Case* was pending before the Supreme Court; and certiorari was later granted (Oct. 12, 1931; 284 U. S. 600).

The opinion in the *Eagle Case* indicates that the majority of the Court based its conclusion, that the rates as charged were not to be regarded as Commission-made, in large part upon the fact that the rates originally approved had been subjected to several intervening general changes, particularly the general changes of 1920 and 1922. The Court cited:

> *Brimstone R. & C. Co. v. U. S.* (1924), 276 U. S. 104,

and quoted a portion of that opinion, in which it was said (122):

> "The general findings and permission of *Ex Parte, 74* and *Matter of Reduced Rates* did not approve or fix any particular rate * * * In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates—and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

The Circuit Court therefore concluded that the intervening changes had taken away from the original rates whatever Commission-made status they had possessed.

The rates which were the subject of the reparation award involved in the *Arizona Case* likewise passed through one of these same general changes, for the

rate prescribed in the *First Phoenix Case,* in 1921, was 96½ cents; whereas the 96-cent rate, established in conformity with the order, was reduced 10 per cent, in 1921, in response to the decision in *Reduced Rates 1922,* supra, and was further voluntarily reduced on January 11, 1924, in the same manner as the rate involved in the instant case. It was strongly urged, in the argument before the Supreme Court in the *Arizona Case* (Dec. 8, 1931), particularly by the Interstate Commerce Commission and certain others who appeared as *amici curiae* seeking to reverse this Court's decision, that this intervening general change had operated to deprive the rates, *as charged,* of any Commission-made status previously bestowed upon the original 96½-cent rate, by the decision in the *First Phoenix Case.* The decisions in the *Eagle Case* (in which certiorari had then but recently been denied: 284 U. S. 675; Nov. 30, 1931), and the *Brimstone Case* were particularly relied upon to support this contention. A summary of the argument thus made by the Commission, as *amicus curiae,* appears in the official report of the *Arizona Case* (284 U. S., at p. 380).

While the point is not separately discussed in the opinion, the Supreme Court in effect decided the contrary, for it concluded, apparently without difficulty, that the rates as actually charged retained the Commission-made status acquired, *prior* to the change, by the rate out of which they had evolved. The Court's failure to mention the issue specifically in its opinion did not render the decision any the less a complete determination and disposition thereof.

The question having been duly and fully presented, was necessarily resolved by the Court's judgment.

Grubb v. Public Utilities Commission (1931), 281 U. S. 470 (477, 478);

Fidelity etc. Co. v. U. S. (1902), 187 U. S. 315 (319);

Capuccio v. Caire (1932), 215 Cal. 518 (530).

This Court may recall that a somewhat similar argument was made by counsel appearing as *amici curiae* in the *Arizona Case.* A summary of this argument will be found in the concluding portion of this Court's opinion (49 F. (2d), at p. 571). Reference was made by counsel to the *Brimstone Case;* but this Court reached the conclusion, in which it was sustained (as noted above) by the result of the Supreme Court's decision, that the intervening general change of 1922 had not operated to deprive the rates of the Commission-made status conferred upon them in 1921.

It is not open to question that the general change of 1922 was precisely the same, in its essential character, as the general changes of 1918 and 1920. In fact, the changes of 1920 and 1922 are treated as having been the same, in legal effect, by both the Supreme Court, in the *Brimstone Case* (276 U. S., pp. 112-113, 122-123) and the Circuit Court of Appeals for the Fifth Circuit, in the *Eagle Case.*

Consideration of the facts involved in the *Wholesale Grocery Case* further supports our position. The rates actually reviewed by the Commission in the *Graham Case,* and there approved, were those in effect on January 18, 1922 (see 81 I. C. C., at p. 138;

Defendants' Exhibit D: R. 183). The shipments involved in that proceeding moved during 1923, 1924, and 1925; and since the general percentage change of 1922 became effective on July 1st of that year, obviously the rates *charged* were in all instances the rates considered and approved by the Commission, *as modified by that intervening change.* Nevertheless, this Court found no difficulty in reaching the conclusion that they had retained their Commission-approved status, and that reparation could not be awarded for their assessment. To that extent this Court's recent decision is thus in conflict with the conclusions of the Circuit Court for the Fifth Circuit in the *Eagle Case.*

The decision of the District Court for Arizona (three Judges sitting), in

E. P. & S. W. R. Co. v. Arizona Corporation Commission (1931), 51 F. (2d) 573,

is likewise inconsistent with the views announced in the *Eagle Case,* but wholly consistent with the position taken by the Supreme Court and by this Court in the *Arizona Case* and the *Wholesale Grocery Case.* In that case the plaintiff sought to have the Arizona Commission permanently enjoined from awarding reparation against certain intrastate rates which, prior to 1921, that Commission had approved. Subsequently to that approval, the Interstate Commission authorized the general increase of 1920, which the Arizona Commission refused to permit to become effective upon Arizona intrastate traffic. The Interstate Commission thereupon exercised its paramount jurisdiction, and required the state rates to be advanced in the same manner as the interstate rates.

Later, the Arizona Commission assented to the increase. The Arizona rates were also subjected to the general reduction of July 1st, 1922. The Court held that, despite the general advance and reduction since the rates were first approved, those rates, as charged *subsequent* to 1922, were not subject to reparation, and granted a permanent injunction, from which no appeal was taken. The Court cited (51 F. (2d), p. 577) and relied upon the principle stated by this Court in the *Arizona Case.*

It seems clear that if (as was thus held) the general modification of 1922 did not deprive rates prescribed or approved by the Commission prior thereto of their Commission-made character, when applied and collected subsequent to the change, then equally the general changes of 1918 and 1920 were also inoperative to deprive a rate approved by the Commission prior thereto of its status as a Commission-made rate. The Supreme Court, this Circuit Court, and the special District Court for Arizona have all declared, either expressly or by refusal to give heed to the opposing view urged by interested parties, that the general modification of 1922 did not render a previously approved or prescribed rate any less "Commission-made". To the extent that the *Eagle Case* declares and relies upon a contrary principle, to sustain an award of reparation against a rate previously approved, it is in conflict with the decisions of the Supreme Court and of this Court in the *Arizona Case* and the *Wholesale Grocery Case,* and of the District Court for Arizona in the *El Paso and Southwestern*

Case, and therefore of no value as an authority in the instant proceeding.

(b) The effectiveness of the finding in Docket 6806, approving the rates, was not destroyed by the lapse of the time intervening prior to the charging of the assailed rates.

It may nevertheless be argued that even if the Commission's finding in Docket 6806 be construed as an approval of the rates in effect at the date of the decision, nevertheless it lost its effective force after two years, and is therefore wholly inoperative to bar the subsequent awards of reparation here in suit. Such argument would undertake to distinguish between the instant case and the *Arizona Case,* in that there the decision prescribing the rates for the future, against which reparation was later awarded, was rendered in 1921. We anticipate that plaintiffs may point to the fact that *prior* to 1920, an *order* of the Commission prescribing rates for the future could not, under Section 15 of the Act, continue in effect for more than two years from its date; whereas, under the Act as amended in 1920, an affirmative order prescribing future rates may now continue in effect for an indefinite period, and until changed. It may be noted that the Circuit Court, in deciding the *Eagle Case,* relied to some extent upon this consideration (51 F. (2d), p. 444).

It is our position that this argument, if it be made, is legally untenable and essentially illogical, and that the *Eagle Case,* to the extent that it appears to support that argument, is erroneous because in conflict with controlling decisions of the Supreme Court.

It should be noted that defendants do not rely at all upon the *order* made in Docket 6806. Their defense is based upon the express *finding* there made by the Commission, particularly as that finding was addressed to the rate made effective, during the pendency of the case, to Tucson. The Commission's *order* in Docket 6806 (R. 136-137) related entirely to rates *for the future* to *Phoenix and Prescott,* neither of which points is involved as the destination of any of plaintiffs' shipments. While the order refers to and by such reference includes the opinion, the context makes it clear that this reference was merely for the purpose of affording proper support, through an express finding of fact, for the affirmative order respecting the future rates to Phoenix and Prescott. No affirmative *order* was made, dealing with the rates to Tucson; and the *finding* contained in the opinion, relating to the rates to that point, was therefore not an essential part of the order.

This Court, in concluding the opinion in the *Wholesale Grocery Case,* pointed out (68 F. (2d), p. 609) that an opinion and an order of the Interstate Commerce Commission are to be read together, and the former is to be treated as part of the latter; but clearly that principle applies only where the opinion and the order both relate to the same subject matter, and are each essential to the other. There may be and frequently are circumstances in which the two must be considered separately. Both the Act, and the decisions of the Supreme Court and the inferior Federal Courts, recognize a substantial distinction

between an *order* of the Commission, which is mandatory, and its *findings,* which are merely directory. The Act itself treats of the two separately. Authority to make findings and to incorporate them in a formal opinion is contained in Section 14 of the Act; whereas Section 15 confers the authority to make orders for the future, while Section 16(1) authorizes the making of orders for the payment of reparation. Moreover, the Commission may, and in many instances does, write an opinion, incorporating therein formal findings, but forbears to make any order. Such action was taken in two proceedings which are referred to frequently in the record (R. 16, 127, 214, 215) in the instant case:

Reduced Rates 1922, supra;
Arizona Corp. Comm. v. A. E. R. Co. (1926), 113 I. C. C. 52.

The Commission also follows the rather common practice of making orders, without any accompanying opinions or findings. Such orders are not officially reported, and therefore no examples are available to be cited here; but every practitioner before the Commission is familiar with this practice.

The essential distinction between the Commission's findings and its orders has been recently emphasized by the Supreme Court, in

U. S. v. A. B. & C. R. Co. (1931), 282 U. S. 522.

That case arose out of an attempt by a carrier to enjoin an alleged *order* of the Commission in a pro-

ceeding in which it was affected. It appeared that no *formal order* had been made, and that the Commission had merely rendered an *opinion,* containing certain *findings* to which the carrier objected. The Supreme Court held that the opinion and the findings were not an order, and therefore not subject to injunction proceedings under the Act of June 18, 1910 (37 Stat. 539). It said (527):

> "* * * The action here complained of is not in form an order. It is a part of a report—*an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization*—and for compelling reasons. Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. See *United States v. Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 310. In others, to make determinations. See *Great Northern Ry. Co. v. United States,* 277 U. S. 172. In some, it acts in an advisory capacity. Compare *Minneapolis & St. Louis R. Co. v. Peoria & Pekin Union Ry. Co.,* 270 U. S. 580, 584-5. In others in a supervisory. *Even in the regulation of rates,* as to which the Commission possesses mandatory power, *it frequently seeks to secure the desired action without issuing a command.* In such cases it customarily points out in its report what the carriers are expected to do. *Such action is directory as distinguished from mandatory.* No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review" (emphasis supplied).

In

Brady v. Interstate Commerce Commission (1930), 43 F. (2d) 847 (affirmed, *per curiam:* 283 U. S. 804),

the District Court for the Northern District of West Virginia (three Judges sitting), speaking through Circuit Judge Parker, emphasized the distinction between the *findings,* upon which the reparation order complained of was based, and the *order* itself, saying (850):

> "We think it clear that the suit should be dismissed. In the first place, it is clearly not a case 'brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission', to use the language of the section relied on; for the reason that it seeks not to set aside the *order* of the Commission, but to correct alleged errors in the *findings* of the Commission upon which that order is based. The order of the Commission is that which commands the railroads to pay complainant the sum of $12,838.31 by way of reparation, not the recitals of findings of fact. *An 'order' is a 'mandate, precept; a command or direction authoritatively given; a rule or regulation'. Black's Law Dictionary;* 46 C. J. 1131; 42 C. J. 464. *An order of the Commission is analogous to the judgment of a court; and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument.* 15 R. C. L. 570; *Judge v. Powers,* 156 Iowa 251, 136 N. E. 315, Ann. Cas. 1915B, 280. As said by Judge Learned Hand in *Eckerson v. Tanney* (D.

C.), 235 F. 415, 418, 'The judgment itself does not reside in its recitals, but in the mandatory portions'. It has been expressly held that *findings of the Commission embodied in its reports are not orders within the meaning of the statutes relating thereto"* (emphasis supplied).

Other cases to the same effect include:

American Sugar Refining Co. v. D. L. & W. R. Co. (C. C. A. 3rd, 1913), 207 Fed. 733 (740-741);

C. B. & Q. R. Co. v. Merriam (C. C. A. 8th, 1922), 297 Fed. 1 (3-5).

In view of these controlling decisions, it seems unnecessary to discuss the distinction further; but it may be observed that whereas the Commission's *findings,* contained in its opinions, are subsequently published in the bound volumes of the Commission's reports and thus, under Section 14 of the Act, become matters of judicial notice, the *orders* (except in "finance docket" cases) are not customarily carried into the published reports, do not appear in the bound volumes of the Commission's decisions, and therefore receive judicial notice only if properly brought before the Court as a part of the record, as has been done (R. 8-36, 128-197) with certain of the reports relied upon by the parties in the instant case.

The essential reason for drawing this sharp distinction between the finding in Docket 6806, as it related to the rate to Tucson, and the order there entered, which related only to the rates to Prescott and Phoenix, is to demonstrate that the two-year limita-

tion did not apply to the finding upon which defendants rely. Section 15 of the Act, which authorized the making of the order, also contained the express limitation that the order so made could have an effective life of not more than two years; and indeed that limitation was explicit in the order (R. 137). No such limitation was contained in Section 14 of the Act, as it read in 1915, and no such limitation now appears in that section. No such limitation appears in the opinion in which the findings relating to the rates to Tucson and other destinations, other than Prescott and Phoenix, were incorporated. The two being essentially distinct, and *the findings in particular being in no wise dependent upon the order,* it should be clear, without any necessity to cite authorities further, that the limitation did not and was not intended to apply to those findings. However, decisions of the Supreme Court specifically sustain our view that the two-year limitation, upon orders for the future as it existed prior to 1920, had no application to findings made by the Commission. In

S. P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433,

one of the questions directly presented and passed upon was whether the limitation applied to the Commission's findings, as well as to its orders, in such manner as to render moot a suit involving the validity of one of its decisions, which suit had not reached final determination within the two-year period. The Supreme Court held directly that the limitation did not govern, saying:

"The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* this day decided *post,* p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy."

In

Southern Pacific Terminal Co. v. Interstate Commerce Commission (1911), 219 U. S. 498,

there was also involved the question of the validity of a decision rendered in 1908, when the Act contained the two-year limitation upon orders. It was contended that since the two-year period had passed, the case had become moot. The Supreme Court said (515):

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration.

> The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

The decision in the *A. B. & C. Case,* supra, also indicates that the *findings* of the Commission, addressed to existing or future rates, considered apart from its *orders,* themselves possess sufficient force to constitute a determination of the matters with which they deal; and this principle is further sustained by other decisions. In

Western Paper Makers' Chemical Co. v. U. S. (1926), 271 U. S. 268,

the Supreme Court discussed the effect to be given to an administrative determination by the Commission, saying (270-271):

> "* * * Counsel agreed upon a short statement of the whole evidence sufficient to enable this court to consider whether there was any evidence to support the *findings* of the Commission.
>
> The objections as presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions. It was urged that these are inconsistent with conclusions reached by it in similar cases; that the *findings* are inconsistent with some views expressed in its reports in this

proceeding; that some evidence was improperly considered; and that inferences drawn from some of the evidence were unwarranted. These objections we have no occasion to discuss. The determination whether a rate is unreasonable or discriminatory is a question on which the *finding* of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. (Citing cases.) * * * There was ample evidence to support the *finding* that the joint through rates regarded as entireties were reasonable and justified" (emphasis ours).

In

Virginian R. Co. v. U. S. (1926), 272 U. S. 658, the Court discussed the conclusive effect of a finding relating to future rates, saying (665-666):

"The Virginian contends that the evidence before the Commission does not support its *finding* that the rates on coal from the Virginian's mines * * * are unreasonable * * * The *finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience'.* * * * This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with *findings* made in other proceedings before it * * * This fact, and much else in the voluminous record, affords substantive evidence to support the *finding* that the existing rates are unreasonable and that those which the order directs are reasonable" (emphasis ours).

The Commission has itself declared that its findings are binding upon the parties, even where not accompanied by orders. In

Owensboro Wheel Co. v. Director General (1922), 69 I. C. C. 503,

the Commission referred to its report in a prior proceeding, saying (506):

> "Defendants apparently consider that our findings in that case were not binding upon the carriers, because no order was entered therein; but in view of the nature of that proceeding the contention is without merit."

To the same effect, see, also:

Fels & Co. v. Penn. R. Co. (1912), 23 I. C. C. 483 (486-487).

The text of the opinion in the *Eagle Case* shows that the Court completely overlooked the distinction between the Commission's findings and its orders, in reaching its conclusion. The decision proceeds upon the assumption that the carriers were relying, not upon a *finding,* but upon an *order* made in 1915. Obviously it is not in point here. If, however, the decision is to be construed as declaring that, because of the statutory limitation upon orders, a *finding* made by the Commission prior to 1920 lost its validity, and was of no avail after two years, it is squarely in conflict with the above decisions of the Supreme Court, and therefore erroneous; and it cannot be accorded controlling effect in the instant case.

The opinion in the *Eagle Case* loses sight also of the well-understood principle of law, frequently an-

nounced by the Supreme Court, that when the Commission, acting in its administrative capacity, makes a determination regarding the reasonableness of a particular rate *for future application,* that determination is conclusive until thereafter changed *for the future,* provided the Commission has proceeded upon the basis of at least some evidence, and has not exceeded the powers conferred by Constitution or statute; and that a rate prescribed or approved pursuant to that determination is *conclusively* presumed to be lawful, until the Commission thereafter makes some further determination. More briefly stated, the rule is that a Commission-made or approved rate, as applied to traffic moving after the Commission has rendered its decision and until a further decision is made, carries with it a *conclusive* presumption of lawfulness. That principle is inherent in the decision in the *Arizona Case;* indeed, it is the basis for the conclusion that the Commission, acting in a quasi-judicial capacity to award reparation, "was bound to recognize the validity of the rule of conduct prescribed by it", in its administrative capacity, "and not to repeal its own enactment with retroactive effect". Leading cases which declare this basic principle include:

Interstate Commerce Commission v. Union Pac. R. Co. (1912), 222 U. S. 541 (547, 548);

Western Paper Makers' Chemical Co. v. U. S., supra;

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294 (311);

Virginian R. Co. v. U. S., supra.

It will be observed that some of these cases were decided prior to 1920, when the two-year limitation upon orders for the future appeared in the Act, and others since that time; but the principle they announce does not vary. The decision in the *Arizona Case* follows the same principle, and makes it quite clear that a decision of the Commission prescribing or approving rates for the future confers upon the rates so approved or prescribed a conclusive presumption of reasonableness, as long as the Commission's determination remains unchanged. The decision in the *Eagle Case* disregards entirely this established principle. It proceeds upon the directly contrary theory that when the Commission, having approved a rate for future application, thereafter takes *no* action, the conclusive presumption of reasonableness nevertheless vanishes after two years, and the approved rate may then be found to have been unreasonable, and made the subject of a reparation order, even though the carriers have continued to apply the rate *as approved,* without any change other than those properly authorized or required by competent governmental authorities. The decision in the *Eagle Case* thus clearly conflicts with the principles laid down by the Supreme Court in the decisions cited and in numerous others, and particularly with the basic principle of the *Arizona Case.* For this additional reason, therefore, the *Eagle Case* cannot be regarded as a controlling authority in the premises.

We anticipate that it may possibly be asserted that the *Eagle Case* has acquired the status of a decision approved by the Supreme Court, for the reason that

certiorari was denied. It is well established that denial, by the Supreme Court, of a writ of certiorari imports no expression of opinion upon the merits of the case, and does not operate in any sense as an affirmance.

U. S. v. Carver (1921), 260 U. S. 482 (490);
Hamilton Shoe Co. v. Wolf Bros. (1916), 240 U. S. 251 (258).

We ask the Court to conclude that the *Eagle Case* is not a controlling precedent in this case, for the reasons above set forth, and that the trial Court, to the extent that its decision was influenced thereby, committed material error requiring reversal of the judgments.

II.

THE RATES AND CHARGES ASSESSED UPON THE SHIPMENTS UPON WHICH REPARATION IS CLAIMED WERE NOT UNREASONABLE.

1. The substantive issue of the reasonableness of the rates as charged was properly presented for determination by the trial Court. That determination may be reviewed by this Court upon this appeal.

Before entering into our discussion of the character and legal sufficiency of the evidence received at the trial, we shall call attention to certain general provisions of law relating to the conduct and decision of reparation proceedings.

The instant suits are "reparation suits", of the type contemplated and provided for by Section 16(2) of the Interstate Commerce Act (49 U. S. Code, Sec-

tion 16-2). So far as material here, that section provides:

> "If the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file * * * a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit (now District) Court of the United States shall proceed in all respects like other civil suits for damages, except that *on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated* * * *" (emphasis ours).

The Supreme Court and the inferior Federal Courts, in a series of cases, have held in effect that that statute preserves for the defendant carrier the right to a trial *de novo, in court,* upon the substantive issue whether the rates attacked for reparation purposes were unreasonable or otherwise in violation of law, and that in such trial the findings and order of the Commission are mere *prima facie* evidence.

In

Meeker v. Lehigh Valley R. Co., supra,

the Court said (236 U. S., at p. 430):

> "It is also urged, as it was in the courts below, that the provision in Sec. 16 that, in actions like this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by

jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents" (emphasis ours).

In

Spiller v. A. T. & S. F. Ry. Co. (1920), 253 U. S. 117,

the Court referred to the *Meeker Case,* saying (131-132):

"And the fact that *a reparation order has at most only the effect of prima facie evidence* (citing cases), *being open to contradiction by the carrier when sued for recovery of the amount awarded,* is an added reason for not binding down the Commission too closely in respect of the character of the evidence it may receive * * *" (emphasis ours).

In

Lewis-Simas-Jones Co. v. S. P. Co., supra,

the Court again referred to the *Meeker Case,* saying (283 U. S., at pp. 660-661):

"The Act does not create a cause of action based on the Commission's findings and reparation order for the recovery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness

of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit.

Section 16(2) provides that, if the carrier shall not comply with an order for the payment of money within the time specified, the person for whose benefit it was made may file in the district court of the United States 'or in any state court of general jurisdiction' a petition setting forth briefly 'the causes for which he claims damages and the order of the Commission', and that the suit in the United States court shall proceed in all respects 'like other civil suits for damages' except that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. The section contains nothing relating to evidence or procedure in state courts. *It is clear that the action is not on the award as such"* (emphasis supplied).

A rather full discussion of the nature of a reparation suit is contained in the very recent decision in:

B. & O. R. Co. v. Brady (1933), 288 U. S. 448.

In that opinion the Court said (457-458):

"This is not a suit authorized by Sec. 9 but one brought under Sec. 16(2) because of defendants' refusal to comply with the Commission's order. Subject to *the right of contestation preserved by the Act* (*Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, 430) it is a suit for the enforcement of the award. Sec. 16(3) (f). *Lewis-Simas-Jones Co. v. Southern Pacific Co.,* 283 U. S. 654, 661. Section 16(2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remedi-

less. *Standard Oil Co. v. United States,* 283 U. S. 235. *Brady v. United States,* 283 U. S. 804. *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *Louisville & N. R. Co. v. Ohio Valley Tie Co.,* 242 U. S. 288. *Cf. Penna. R. Co. v. Clark Coal Co.,* 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. *Cf. Mitchell Coal Co. v. Penna. R. Co.,* 230 U. S. 247, 258.

The fact that *the Act* merely makes the findings and report of the Commission *prima facie* evidence and so *preserves the defendant's right to contest the award* gives no support to plaintiff's contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that *Congress saved their right to be heard in court upon the merits of claims asserted against them''* (emphasis ours).

In an early case under the Act, the carriers' (and the shippers') right to introduce additional evidence dealing with the ultimate issues, and thus in effect to have a trial *de novo,* was recognized.

In

C., N. O., & T. P. Ry. Co. v. Interstate Commerce Commission (1896), 162 U. S. 184,

the Supreme Court said (196):

''The theory of the Act evidently is, as shown by the provision that the findings of the Com-

mission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. *We do not mean, of course, that either party, in a trial in the Court, is to be restricted to the evidence that was before the Commission* * * *" (emphasis ours).

In

Pittsburgh & W. V. Ry. Co. v. United States (1924), 6 F. (2d) 646,

the District Court for the Western District of Pennsylvania (three Judges sitting) held, in an opinion written by Circuit Judge Wooley, that an injunction would not lie against the enforcement of a reparation order, for the reason that the carriers were enabled, under the law, to have a full trial of the issues of fact. The Court said (648):

"*An order of the Commission awarding reparation is not a cause of action. Nor is it in the nature of a judgment on which execution may issue.* It is an award of money damages and is declared by statute to be evidence, and then only *prima facie* evidence, of the facts found by the Commission (section 16 of the Interstate Commerce Act of February 4, 1887 (24 Stat. 379), as amended by section 13 of the Act of June 18, 1910 (36 Stat. 539, (Comp. St. Sec. 8584)), to be used only as such in an action which may be instituted after default by a carrier to obey the order of payment. *The provision in section 16* of the Act that, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' *has been held* by the Supreme Court *only to establish a rebuttable presumption*" (emphasis ours).

In

Brady v. Interstate Commerce Commission, supra,

the Court announced conclusions consistent with the decisions above cited. After referring to the opinion in the *Pittsburgh Case,* the Court quoted (43 F. (2d), p. 852) a portion of the opinion in the *Meeker Case,* and said further:

> *"If therefore the carrier deems the order erroneous, it has full opportunity to correct the error or defend against it upon the trial.* * * * The order and findings of the Commission are *prima facie* evidence, just as is the report of an auditor in an action at law" (emphasis ours).

In

Blair v. Cleveland, C., C. & St. L. Ry. Co. (1931), 45 F. (2d) 792,

the Court said (793):

> "Under section 16 of the statute the findings and order of the Commission are *prima facie* evidence of the facts therein stated. The effect of this statute is as stated by *Meeker v. Lehigh Valley Railroad Co.,* 236 U. S. 414, 35 S. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, to establish a rebuttable presumption, cutting off no defense, and taking no question of fact from either court or jury. It merely creates a rule of evidence and does not abridge the rights of either party. To the same effect are *Mills v. L. V. R. R. Co.,* 238 U. S. 473, 35 S. Ct. 888, 59 L. Ed. 1414; *Pittsburgh & W. V. Ry. Co. v. United States* (D. C.) 6 F. (2d) 646; and *Missouri, K. & T. R. Co. v. Interstate Commerce Commission* (C. C.), 164 F. 645.

The hearing in this court is de novo, and the court is entitled to receive and consider evidence in addition to that before the Commission, but the prima facie case made out by the findings and order of the Commission will prevail unless overcome by evidence submitted by defendants" (emphasis ours).

In

Atlantic Coast Line R. Co. v. Smith Bros. (C. C. A., 5th, 1933), 63 F. (2d) 747; (certiorari *denied,* May 29, 1933; 289 U. S. 761),

the Court said (748):

"The prima facie effect which the statute accords to the findings and orders of the Commission (in a reparation case) * * * is of course rebuttable * * *; but until rebutted it does make out a case * * *" (citing, among others, the *Meeker,* and *Blair Cases,* supra, and the *Sou. Ry. Case,* infra).

To the same effect, see:

Southern Ry. Co. v. Eichler (C. C. A. 8th, 1932), 56 F. (2d) 1010 (1018).

At the trial of these cases, counsel for plaintiffs did not dispute the propriety of a determination by the trial Court of the substantive issue of the reasonableness of the rates charged apparently recognizing the controlling effect of the decisions above cited. This attitude was consistent with the position taken by the same counsel, then representing the Arizona Grocery Company, at all stages of the *Arizona Case.* Indeed, plaintiffs offered evidence in addition to the Commission's opinion and order (Exhibit 5, and the accom-

panying testimony of Witness Reif: R. 218-224) which could have had no other purpose than to support their major allegations of fact, thus plainly indicating that counsel considered that the issue was open, and that the trial was *de novo*.

Nevertheless, we anticipate that it may possibly be argued, upon this appeal, that the Commission's purported determination of the unreasonablenes of the rates charged must now be regarded as conclusive, there having apparently been at least *some* evidence before the Commission upon which that determination was based. In this behalf reference may be made to two recent decisions:

> *South Carolina Asparagus Growers Ass'n v. Southern Ry. Co.* (C. C. A., 4th, 1933), 64 F. (2d) 419;

and

> *Glenns Falls Portland Cement Co. v. D. & H. Co.* (C. C. A., 2nd, 1933), 66 F. (2d) 490.

An examination of these opinions will indicate that in both, the view that the Commission's findings are conclusive, *in reparation suits,* was based upon excerpts from the opinion in:

> *Mitchell Coal Co. v. Pennsylvania R. Co.* (1913), 230 U. S. 247,

the language relied upon being found principally at pages 257 and 258 of that opinion. The Supreme Court there said, in part, that the shipper's right to sue at common law for the charging of unreasonable rates in the past was abrogated by the Interstate Commerce Act; and a right was given which, as a

condition precedent, required a finding of unreasonableness by the Commission. It then said, further, that orders of the Commission

> "so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, may take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct, in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court, and the right to a judicial hearing."

The opinion in the *Glenns Falls Case* also refers to and relies upon the decision in:

Adams v. Mills (1932), 286 U. S. 397 (410).

We think that it should be clear, upon analysis, that these two decisions of the Circuit Courts cannot be regarded as well-reasoned or controlling. They fail completely to give any effect to the most important statements contained in the *Mitchell Case;* namely, that reparation orders of the Commission are quasi-judicial, and only *prima facie* correct, in so far as they determine the *fact* and amount of damage, and the carrier is by statute given its day in Court, and *the right to a judicial hearing.* Moreover, they appear to disregard entirely the more recent *Meeker* and *Lewis-Simas-Jones Cases,* in which the Supreme Court declared that the statute constitutes only a *rule of evi-*

dence, under which a mere *rebuttable presumption* in favor of the claimant is created, and that no question of fact is taken from either Court or jury. They likewise overlook the express provision of the statute, also emphasized in these decisions, that the suit shall proceed in *all respects like other civil suits for damages.* Finally, they fail to consider the affirmance of these principles, and the outright statement of the Supreme Court that the carrier's right of defense is in no wise impaired, in the most recent decision in point:

B. & O. R. Co. v. Brady, supra.

It is of interest to note that the Circuit Court for the Second Circuit admits (66 F. (2d), at p. 494), that the Federal Courts are not in unanimity upon this question, particular reference being made to the *Blair Case,* above cited.

The view stated in the *South Carolina* and *Glenns Falls Cases* loses sight of the essential distinction between orders of the Commission operating *for the future,* which are *legislative* in character, and *conclusive* against attack in the Courts, provided only that they are jurisdictionally made and supported by at least some competent evidence; and findings and orders *for reparation,* which operate only upon *past* transactions, are *quasi-judicial* in character, and are specifically given mere *prima facie* effect by the statute and the controlling decisions. The essential distinction between these two types of orders has frequently been stated; for example, in the *Mitchell Case* (230 U. S., p. 259), the *Arizona Case* (284 U. S., pp. 388-389); and in

Baer Bros. v. D. & R. G. R. Co. (1914), 233 U. S. 479 (486);
Great Northern Ry. Co. v. Merchants Elevator Co. (1922), 259 U. S. 285 (291).

The interpretation advanced in these two cases likewise loses sight of the possible unconstitutionality of the statute, if it should be so construed and applied as to cut off the right of the defendants to a trial of the issues of fact before a jury. The opinion in the *Meeker Case* shows that this consideration strongly influenced, if it did not control, the conclusion therein, the Court apparently taking the view announced in its own decisions, that the statute should be so construed, if possible, as to avoid bringing it into conflict with the Constitution:

Harriman v. I. C. C. (1908), 211 U. S. 407 (422);
Ann Arbor R. Co. v. U. S. (1930), 281 U. S. 658 (669).

It will hardly be questioned that the substantive issue is properly presented by the pleadings. The complaints allege, if not directly at least by reasonable inference, that the rates against which reparation is sought were unreasonable, in violation of the Interstate Commerce Act (R. 3-4, 44) and that plaintiffs were damaged by their assessment and collection, and the refusal of defendants to pay reparation (R. 6-7, 47). The answers, as amended, specifically deny (R. 58-59, 64) that the rates were unreasonable or otherwise unlawful; and allege further, as a matter of

affirmative defense (R. 62, 66-67), that each and all of said rates were at all times reasonable, and in full conformity with the requirements of the Act.

Both the plaintiffs and the defendants proposed findings (Plaintiffs' Proposed Finding No. X in Case No. L-738: R. 74-75; Plaintiff's Proposed Finding No. VI in Case No. L-844: R. 83; Defendants' Proposed Finding No. 16: R. 246-247) to cover this issue. The Court rejected defendants' proposed finding (R. 247), and adopted a finding substantially as proposed by plaintiffs (R. 255) to the effect that the freight charges as assessed were unjust and unreasonable. Defendants duly excepted to the latter finding, and assigned error (Assignment of Error No. 19: R. 298), upon the ground that the Court's finding was not supported by competent evidence, and was and is wholly contrary to the uncontradicted evidence. Defendants likewise moved for a nonsuit at the conclusion of plaintiffs' testimony in chief, which motion was denied, and exception duly saved (R. 126-127). The issue is thus properly before this Court for its determination.

Maryland Casualty Co v. Jones (1929), 279 U. S. 792;

Fleischmann Co. v. U. S. (1926), 270 U. S. 349 (356).

Particularly, the instant cases being actions to enforce reparation awards, this Court has a right to examine the record here before it in order to determine whether the findings and orders in suit were properly made, in the light of that record.

In

Southern Ry. Co. v. Eichler, supra,

the Court said (56 F. (2d), pp. 1018, 1019):

> "This appeal is to review the judgment of the District Court in a suit to enforce an order of the Interstate Commerce Commission. In that action the order of the Commission is made *prima facie* evidence of the findings made by it. *It is for this reason that appellate courts have a duty to examine the evidence for the purpose of ascertaining whether such findings are substantially supported;* and, in so doing, they are confined to the record presented for review. In that record we find the order of the Commission sought to be enforced, *the testimony of witnesses introduced at the trial* * * * We are not permitted to go outside that record on this appeal * * * *We have carefully considered the evidence preserved and presented for review* * * *" (emphasis supplied).

It may be added that the Court, upon such review, after an exhaustive examination of the record, reversed the District Court's judgment, and in so doing also reversed, in effect, the Commission's findings and order.

We ask this Court to conclude that the determination of the substantive issue of the reasonableness of the rates was not foreclosed or precluded, by reason of the finding and orders upon which the suits are predicated; that in these suits an independent reëxamination of that issue may be made by the trial Court, upon the evidence introduced before that Court; that such reëxamination by the trial Court may be

thereafter reviewed upon appeal; and that the issue is properly before this Court for review, upon this appeal.

2. **Plaintiffs' evidence is wholly inadequate, as a matter of law, to support the trial court's finding and conclusion that the rates and charges in issue were unreasonable.**

The evidence offered by plaintiffs, and relied upon by the trial Court to support its findings and conclusions, consisted principally of the following:

(a) The Commission's opinion in the *Third Phoenix Case,* containing the finding that the rates in issue, as applied, were unreasonable (Plaintiffs' Exhibit 1: R. 8-27);

(b) The reparation orders, dated Sept. 7, 1929, and April 13, 1931, in favor of these plaintiffs and certain other shippers (Plaintiffs' Exhibits 2 and 3: R. 40-41, 52-53);

(c) Plaintiffs' Exhibit 5, and the accompanying oral testimony of Witness Reif (R. 218-224).

The balance of plaintiffs' showing consisted of the Rule V statements (Plaintiffs' Exhibit 4: R. 37, 49-50, 125), which show simply the details of the shipments upon which reparation is sought, but otherwise establish no legal liability, apart from the finding and orders.

We shall first discuss the value, as *prima facie* evidence, of the Commission's finding in the *Third Phoenix Case,* and thereafter the competency, and evidentiary value otherwise, of the showing made through Witness Reif.

(a) The Commission's finding in the Third Phoenix Case is partially invalid, under various court decisions, and therefore incompetent and inconsistent in its entirety.

The direct finding of the Commission with respect to reparation, upon which the reparation order here in suit is predicated, appears near the conclusion in the opinion in the *Third Phoenix Case,* and so far as material here reads as follows (R. 25-26):

> "* * * We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed, or may exceed, respectively, the following, in cents per 100 pounds:
>
> Prior to July 1, 1922, to Phoenix 79 cents from the southern California group and 81 cents from the northern California group and to Bowie 83 cents from the southern California group and 93 cents from the northern California group; *on and between July 1, 1922, and the effective date of the rates herein prescribed* for the future, *from the southern California group and the northern California group, respectively,* 66 and 66 cents to Yuma, 68 and 69 cents to Kingman, 71 and 73 cents to Phoenix, *73 and 77 cents to* Prescott, Williams, *Tucson,* Flagstaff, and Clarkdale, 75 and 84 cents to Winslow, Holbrook, Bisbee, Bowie, and Douglas, 77 and 87 cents to Safford, and 79 and 89 cents to Gallup, Clifton, and Globe * * *" (emphasis ours).

The Commission also, and at the same time, made formal findings (R. 26) with respect to the levels of the rates for the future, and in the orders accompanying the opinion (R. 28-36) required such rates to be published.

Even a superficial review of the opinion in the *Third Phoenix Case* will convince the Court that the Commission was there attempting, upon the basis of what was referred to (R. 25) as the first comprehensive record upon the subject ever before it, to fix a complete and properly related structure of rates on sugar, both past and future, from California producing points to *all* the principal Arizona destinations. The rates found reasonable for the past (i. e., for reparation purposes) were no less related to each other, having in mind the different distances to the various points (as shown in the decision itself: R. 22), and their competitive relationships, than were the corresponding rates prescribed for the future. Higher rates were therefore prescribed for the longer hauls to points in eastern Arizona, such as Globe, Clifton, Holbrook, Bowie, Bisbee, and Douglas, with somewhat lower rates to less distant points such as Clarkdale and Tucson, and still lower rates to Phoenix. Points to which the distances were approximately the same were grouped on the same rate-basis: e. g., Globe with Clifton, Bisbee and Douglas with Bowie, Tucson with Clarkdale and Prescott. Phoenix, the capital and the largest city of the state, was treated more or less as a key point, particularly since the rates to Phoenix had *twice* been prescribed in comparatively recent cases: and the other rates were quite obviously graded, distance being duly considered, upon levels either higher or lower than the Phoenix rates. It is plain that the finding was carefully worked out so as to produce what the Commission considered to be a harmonious, consistent, and

correctly related rate-structure; and that no part of the finding, relating to any one point, could properly be dissociated from the rest and given separate effect. Indeed, the very text of the finding demonstrates that no separate and individual finding as to any of the points involved, particularly Tucson, was either made or intended. All of the destinations covered by the finding were mentioned *in the same sentence,* and Tucson was grouped with *four* other points; indeed, such grouping was generally followed as to most of the destinations.

(1) The reparation finding is invalid and incompetent because predicated upon a demonstrated misconception of law.

The Court is now confronted with the fact that this finding, together with certain of the reparation orders issued pursuant thereto, has been declared void, because in excess of the Commission's jurisdiction, in so far as it attempted to award reparation upon shipments which moved to Phoenix, Globe, Safford and Clarkdale. Such is the express legal effect of the decisions of the Supreme Court in the *Arizona Case,* of this Court in the *Wholesale Grocery Case,* and of the District Court for Arizona in at least one case involving shipments to Clarkdale: *T. F. Miller Co. v. A. T. & S. F. Ry. Co.,* No. L-824-Phoenix (decided April 15, 1933). No appeal was taken by the plaintiff in the case last mentioned, and the decision therein has become final.

These decisions establish that the Commission, in making its reparation finding, proceeded upon a complete misconception and misapprehension of its powers under the law. The Supreme Court expressly

said, in the *Arizona Case* (284 U. S., p. 389) that the Commission "in its report *confuses legal concepts*"; that the Commission's *error* arose from a failure to recognize" the essential distinction between its legislative function of prescribing future rates, and its quasi-judicial function of awarding reparation. This Court, in the *Wholesale Grocery Case,* emphasized (68 F. (2d), p. 604) the identity of origin of that case and the *Arizona Case,*

> "because we are now being called upon to pass upon *a misconception of the Commission regarding its powers that has already been clearly pointed out by the Supreme Court*" (emphasis ours).

That misconception, as this Court has recognized, pervades the entire finding in the *Third Phoenix Case,* upon which plaintiffs' suits here must depend. It invalidates that finding in its entirety, not merely as to the points where the rates were prescribed or approved in the *First Phoenix Case,* the *Graham Case,* the *Douglas Case*[5], and the *United Verde Case*[6], but as to *all* points. It is inconceivable that the Commission, if it had realized at the time that it was barred by law from awarding reparation on shipments to Phoenix, Globe, Clarkdale, Safford, and (by a parity of reasoning) Douglas, would nevertheless have awarded such reparation on shipments to a related

5. *Douglas Chamber of Commerce, etc. v. A. T. & S. F. Ry. Co.* (1921), 64 I. C. C. 405. A copy of the report and order is in evidence as Defendants' Exhibit C (R. 150-174).

6. *United Verde Ext. Mining Co. v. A. T. & S. F. Ry. Co.* (1924), 88 I. C. C. 5; in which the Commission specifically found reasonable a rate of 86½ cents on sugar from California points to Clarkdale, made effective Oct. 16, 1922 (see Plaintiffs' Exhibit 1:R. 14-15).

point of approximately equal distance, such as Tucson. The whole decision shows that it was the Commission's intention to prescribe, for reparation purposes, a properly related and consistent adjustment, and not the chaotic rate-structure which would result if the finding were held valid as to Tucson, though determined to be legally invalid as to the other destinations. The character of the discriminatory and disordered rate-adjustment which would thus result is set forth on the chart annexed as Appendix A, and is illustrated by the following typical examples:

(a) The rate from northern California points to Clarkdale, on and after January 12, 1924, and until (and after) October 27, 1925, was 84 cents (R. 16). It represented a voluntary reduction below the 86½-cent rate found reasonable in the *United Verde Case*. The contemporaneous rate to Tucson was also 84 cents (R. 16). The distance to Clarkdale was about 820 miles; to Tucson, 847 miles (R. 22). If the reparation awarded on the plaintiffs' 27 shipments which moved during that period from northern California to Tucson is eventually paid, the rate to Tucson points will be retroactively reduced to 77 cents (R. 26, 37, 50), an average reduction of about $43.00 per car; although no such reduction, nor any reduction at all, could lawfully be made upon exactly similar shipments moving from the same points of origin, over the shorter distance to Clarkdale. The report shows (R. 26) that it was the Commission's intention that the rates to Tucson, both for reparation purposes and for the future, should be the *same* as to Clarkdale, instead of substantially *lower*.

(b) The rate from both the northern and southern California groups to Phoenix, during 1923 and prior to January 12, 1924, was 86½ cents. The contemporaneous rate to Tucson was the same. The distances to Phoenix were (R. 22): from the northern California group, about 749 miles; from the southern California group, about 467 miles. The corresponding distances to Tucson were, respectively, about 847 miles and 519 miles. The distances from northern California origins to Tucson were measured over the route of the Santa Fe from Mojave, California, via Barstow, Cadiz, and Parker, to Phoenix, thence via the Arizona Eastern's Phoenix-Maricopa branch, to Maricopa, thence via Southern Pacific to destination. Upon that route, Phoenix was directly intermediate to, and approximately 100 miles *less* distant than, Tucson. If the reparation order is enforced, the rate charged on the seven shipments which moved from northern California points to Tucson during that period will be retroactively reduced to 77 cents, and on the two shipments during that period from southern California points, to 73 cents: thus creating gross discriminations against Phoenix, at which point the corresponding rate cannot be reduced through reparation. This discrimination is accentuated, as to shipments from northern California, by the apparent long-and-short-haul violation. The actual discriminations thus accomplished would amount to about $58.00 per car, on northern California shipments, and about $81.00 per car, on southern California shipments. The actual routes of movement in 1923 and 1924 were practically identical, being over the same rails as far as Mari-

copa, from which the branch-line haul to Phoenix was about 35 miles (R. 11, 12). The report shows that it was the Commission's intention that the rates to Tucson should be higher than the corresponding rates to Phoenix, instead of substantially lower.

(2) The enforcement of the reparation finding and orders would create unlawful discriminations. The finding and orders are therefore invalid, and of no force as evidence to support plaintiffs' contentions.

The anomalous and incongruous results of the enforcement of the reparation order here in suit would be none the less discriminations, of the character condemned by the Act, even though brought into being retroactively, by the enforcement of quasi-judicial orders, rather than by the carriers' voluntary act. The authorities establish that discrimination may be accomplished quite as effectively by the charging of equal amounts for similar services in the first instance, and the subsequent refund, either voluntarily or under judicial compulsion, of a portion of the charges for one service but not for the other, as by the initial charging of unequal amounts. This was precisely the situation involved in:

Wight v. U. S. (1897), 167 U. S. 512,

in which the Supreme Court condemned, *as a discrimination,* a difference in treatment created by the initial charging of the same specified tariff rate to each of two similar and competing shippers, and the subsequent refunding, of a portion of the charges thus collected, to one of the shippers. It was said to be the purpose of the prohibition of discrimination, contained in Section 2 of the Interstate Commerce Act:

> "to enforce equality between shippers; and it prohibits any rebate or other device by which two shippers shipping over the same line and the same distance under the same circumstances of carriage are compelled to pay different prices therefor."

Discriminations of the same kind were discussed in:

Penn. R. Co. v. International Coal Co. (1913), 230 U. S. 184;

and

Mitchell Coal Co. v. Penn. R. Co., supra.

In the *Mitchell Case* it was specifically recognized that a discrimination might be created *retroactively,* by awarding reparation to one shipper but not to another, the Court saying (at p. 259):

> "For, if at the suit of one shipper, a court could hold a past rate or allowance to have been unreasonable and award damages accordingly, it is manifest that such shipper would secure *a belated but undue preference* over others who had not sued and could not avail themselves of the verdict" (emphasis ours).

To the same effect, see:

Texas and Pac. Ry. Co. v. Abilene Cotton Oil Co., supra;

Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662.

An excellent discussion of the manner in which discrimination may be created by the subsequent refunding of a portion of the charges collected upon certain shipments, whereas no such refund is made upon

others moving under similar conditions and at the same rates, is found in:

Union Pac. Ry. Co. v. Goodridge (1893), 149 U. S. 680.

It is very clear that if the carriers created, or even attempted, these discriminations *voluntarily* rather than pursuant to the Commission's quasi-judicial orders, they would arouse instant protest, and incur severe and deserved condemnation. Indeed, an exactly similar discrimination maintained by the carriers was complained of by shippers, and found unlawful by the Commission, which entered a legislative order requiring its termination. In the *First Phoenix Case,* the Commission condemned the rate-adjustment whereby a higher rate was charged on sugar from California to Phoenix, then (1921) a branch-line point, than at Tucson and other more distant main-line points in eastern Arizona, and ordered the Phoenix rates reduced to the main-line basis. The above analysis shows that the enforcement of the reparation order here in suit would nevertheless create again precisely the discrimination found unlawful by the Commission, when maintained by the carriers. It will be borne in mind that the basic purpose of the Interstate Commerce Act is to do away with every form of discrimination and inequality, and to place all shippers upon equal terms.

New York, N. H. & H. R. Co. v. I. C. C. (1906), 200 U. S. 361 (391);

United States v. Union Stock Yards (1912), 226 U. S. 286 (307, 309).

That essential purpose would be absolutely nullified if these awards should be enforced.

It cannot be argued that *unlawful* discriminations would acquire lawful status simply because of the quasi-judicial mandate of the Commission. The several authorities above cited establish the contrary, and it is further made clear by other controlling decisions. The incongruous results of the enforcement of the order, if unlawful when created voluntarily by the carriers, would be equally so when created anew by giving effect to the Commission's reparation finding. The controlling principle was recently stated by the Supreme Court, in forceful language:

> *Texas and Pac. Ry. Co. v. U. S.* (1933), 289 U. S. 627 (637):
>
> "Obviously, what the carrier may not lawfully do, the Commission may not compel."

The Court cited, among others, the following cases establishing the same principle:

S. P. Co. v. I. C. C., supra;

I. C. C. v. Diffenbaugh (1911), 222 U. S. 42 (46);

Ellis v. I. C. C. (1916), 237 U. S. 434 (445);

U. S. v. Illinois Central R. Co. (1924), 263 U. S. 515 (524);

Anchor Coal Co. v. U. S. (1927), 25 F. (2d) 462 (471-2).

(3) The acceptance of the reparation finding as valid prima facie evidence fails to give any proper effect to the controlling decisions in the Arizona and Wholesale Grocery Cases.

The acceptance of the Commission's finding as *prima facie* evidence, sufficient to support the findings and judgment of the trial Court, fails to give due or indeed any effect to the controlling decisions in the *Arizona* and *Wholesale Grocery Cases.* The Court in the *Arizona Case* in effect held that the 96½-cent rate from California points to Phoenix, prescribed in the *First Phoenix Case* in 1921, became *and continued to be,* until the further legislative order of the Commission, the conclusive measure of a reasonable maximum rate for that transportation service. That period continued until February 25, 1925, the effective date of the order in the *Second Phoenix Case:*

> *Phoenix Chamber of Commerce v. A. T. & S. F. Ry. Co.* (1925), 95 I. C. C. 244.

In giving such conclusive effect to the Commission's legislative action in the *First Case,* the Supreme Court followed the consistent course of its own decisions, including those cited in the opinion (284 U. S., p. 386), and various others, of which the following are typical:

> *Interstate Commerce Commission v. Union Pac. R. Co.,* supra;
>
> *Western Paper Makers' Chemical Co. v. U. S.,* supra;
>
> *A. T. & S. F. Ry. Co. v. U. S.,* supra;
>
> *Virginian R. Co. v. U. S.,* supra.

This Court, in the *Wholesale Grocery Case,* adopted and applied the rule of the *Arizona Case* to rates formally *approved* by the Commission, in effect if not in terms concluding that such rates, by virtue of that approval, are conclusively established as reasonable rates, until thereafter changed *for the future* by the Commission, and meanwhile are not subject to retroactive reduction. Because of the Commission's findings in the *Graham Case,* and this Court's conclusions in the *Wholesale Grocery Case,* the rates to Globe and Safford, in effect in 1923 and thereafter until 1928, became the conclusive measure of reasonable rates for the transportation services from California points to those destinations.

The same principle was followed and applied by the trial Court, in passing upon the reparation claims involving shipments to Clarkdale. It is also clear that the same principle applies to the rates on sugar to Douglas, in effect following 1921, because of their approval in the *Douglas Case.*

The trial Court, by adopting and giving effect to the Commission's reparation finding here in suit, permits its decision to be guided, not by these *conclusive* tests, but by some different measure of the reasonable rates to Tucson. In effect, the trial court has said that although 96½ cents was the *conclusive* measure of a reasonable maximum rate from all points of origin in California *to Phoenix,* in 1923 and 1924, rates of 77 cents, from northern California, and 73 cents, from southern California, to Tucson were the highest possible reasonable rates

for the essentially similar, although substantially longer, hauls to the latter point; that although 86½ cents was the *conclusively* reasonable rate from all California points of origin to Clarkdale, up to 1928, the highest possible lawful rates for similar transportation services, from the same points of origin for the equivalent distances to Tucson, were 77 cents from northern California, and 73 cents from southern California. No question can properly be raised but that the transportation to Tucson was largely over the same rails as to Phoenix, as far as the junction point at Maricopa. This is made clear by the opinion in the *Third Phoenix Case* (R. 11, 12), and defendants' undisputed oral testimony (R. 214-215), and by the Court's own judicial knowledge of the location of these several cities. The trial Court's complete abandonment of the conclusive measures of reasonable rates, afforded by the prescribed or approved rates to Phoenix, and Clarkdale, was in fact and effect simply a failure to give proper, or indeed any weight to the essence of the decision in the *Arizona Case,* later adopted and applied both by this Court in the *Wholesale Grocery Case,* and by the District Court in its own decision in the Clarkdale proceeding.

We ask this Court to conclude that the Commission's reparation finding in the *Third Phoenix Case,* and the reparation orders here in suit, are deprived of any value as *prima facie* evidence; and that the trial Court erred, *as a matter of law,* in according *prima facie* weight thereto in arriving at its findings and conclusions herein, because:

(1) The finding, and the resulting order, were based upon a fundamental misconception and misapprehension of the law; namely, the erroneous proposition that the Commission might lawfully award reparation against rates previously prescribed or approved.

(2) That fundamental error pervades the finding in its entirety; for in that finding the Commission treated *all* the rates, to *all* the points there involved, including those points where its jurisdiction has since been declared to have been erroneously asserted, as being interrelated and interdependent, and endeavored thereby to create a properly related and harmonious rate-structure covering all of those related destinations.

(3) The finding having been determined by controlling Court decisions to have been completely invalid as to certain of the destinations, its enforcement as to other destinations, such as Tucson, will create retroactive discriminations, clearly arbitrary and violative of the spirit and intent of the Act, in excess of the Commission's powers thereunder, and wholly contrary to the obvious purpose of the Commission in the premises.

(4) To accord even *prima facie* effect to the finding, as a determination of reasonable rates to the destinations involved here, is to ignore and cast aside the controlling decisions in the *Arizona* and *Wholesale Grocery Cases,* and the trial Court's own final judgment in the Clarkdale suit.

(b) The showing attempted by plaintiffs, apart from the finding and orders in the Third Phoenix Case, was largely incompetent, and in any event wholly inadequate to support the trial court's findings and judgment.

Plaintiffs' evidence, other than the report in the *Third Phoenix Case* (Exhibit 1), the reparation orders (Exhibits 2 and 3), and the Rule V statements setting forth the shipments (Exhibit 4: R. 125), consisted principally of a tabular statement of rates and distances (Exhibit 5) submitted *by way of rebuttal* through plaintiffs' witness Reif, over defendants' objection (R. 219), and the accompanying oral testimony of that witness (R. 218-224).

Although Exhibit 5 was introduced through Witness Reif, the record shows that it was prepared under the supervision of another person, and not by the witness personally, although it does indicate that he "checked the statement to see that it was correct" (R. 223). Moreover, as above noted, both this exhibit and the accompanying testimony were offered in rebuttal of defendants' showing, and not as a part of the plaintiffs' case in chief. None of this testimony appears to be directed toward the rebuttal or contradiction of any specific portion of defendants' evidence; in fact, the evidence is merely cumulative and not proper rebuttal at all.

The exhibit is simply a reproduction, with certain significant omissions as well as some immaterial additions, of the tabulation of destinations, rates and distances, which appears on page 178 (R. 22) of the opinion in the *Third Phoenix Case.* The significant omissions are of the rates and distances to Phoenix,

as well as all the distances from the northern California group to the several destinations. The additions include principally the rates prescribed in the *Third Case,* both for reparation purposes and for the future. All of these rates are set forth at pages 180 and 181 of the decision itself (R. 25-26). It may properly be said, therefore, that Exhibit 5 is nothing more than a reproduction of portions of the Commission's opinion, already in evidence in plaintiffs' case in chief (R. 123); and if the exhibit has any value as evidence here, it is only because it lends graphic emphasis to our statement that the Commission, by that decision, was endeavoring to work out a carefully adjusted and properly related rate-structure, both past and future, covering all the important Arizona destinations. In this respect, however, it adds nothing which was not readily apparent from the opinion.

Considered apart from the opinion, and as an independent rate-comparison, the exhibit has no evidentiary value at all, because based upon an assumption of fact demonstrated by plaintiffs' own showing to be entirely erroneous. In his cross-examination Witness Reif explained (R. 223) that this comparison was predicated upon the theory that the carriers had contended in the *Third Case* "that 120 per cent of Southwestern rates is the measure of a reasonable rate from California to Arizona". It had already been shown by Witness Fielding (R. 216), in answer to questions by *plaintiffs'* counsel, that the carriers had not made that contention in the *Third Phoenix Case.* Moreover, the report in that case (Plaintiffs' Exhibit 1: R. 21) itself shows that the proposal there made

by defendants was that the rates from California to Arizona should be 121 per cent of the Memphis-Southwestern rates, *provided that the rates to Arizona points were based on the weighted average haul.* The distances shown on Exhibit 5 are not *weighted average* distances at all, but simply average short-line distances from and to groups, being the same as those shown in the report in the *Third Phoenix Case* (R. 21, 22).

The authorities sustain the proposition that Exhibit 5, being largely cumulative, was not properly received as *rebuttal* testimony.

Wigmore on Evidence, 4th ed., Vol. III, Sect. 1873;
Revised Code of Arizona, 1928, Sect. 3807;
24 *Cal. Jur.* 764-765.

Defendants duly objected to the receipt of Exhibit 5 in evidence (R. 219), and also duly moved to strike it from the record (R. 224), as incompetent, because not prepared by the witness, and as not proper rebuttal. The trial Court overruled both the objection and the motion. Defendants submit that these rulings were erroneous.

In any event, it is apparent that Exhibit 5, *of itself,* affords no support for the findings and conclusions adopted by the trial Court. To the extent that the Court relied thereon, it committed material error, for the exhibit is incompetent, for the reasons above recited; or if competent, it is subject to all of the infirmities inherent in the reparation finding in the *Third Case.*

3. **Defendants' evidence demonstrates conclusively that the rates as charged were not unreasonable.**

The defendants' affirmative showing, addressed to the issue of the reasonableness of the rates, consists of rate-comparisons (Exhibit F: R. 202-203), supplemented by the oral testimony (R. 198, 205, 212-217) of Witness J. L. Fielding. Mr. Fielding is an experienced railroad traffic officer, whose qualifications were stipulated (R. 198). Various decisions of the Commission relating to rates on sugar and other commodities to Arizona points were also offered by defendants, and received in evidence (Exhibits A to D, inclusive: R. 128-197).

Exhibit F compares the rates charged, as shown upon the Rule V statements, and the rates which the Commission undertook in the *Third Phoenix Case* to declare reasonable for reparation purposes, with rates from the same points of origin in California to other destinations in Arizona (Phoenix, Globe, Safford, and Douglas) which the Commission prescribed or approved as reasonable in the *First Phoenix Case* (Defendants' Exhibit B: R. 138-149), the *Graham Case* (Defendants' Exhibit D: R. 175-197), and the *Douglas Case* (Defendants' Exhibit C: R. 150-174).

These rate-comparisons are directly pertinent, and indeed afford the best possible tests by which to determine the reasonableness of the rates charged. Both the Commission and the Courts have held that a prime test of the reasonableness of a rate is to compare it with rates approved or prescribed by the Commission for application upon the same com-

modity, for similar hauls between related points, in the same territory.

Blackman, et al. v. A. C. & Y. R. Co., et al. (1918), 49 I. C. C. 649 (654):

"One of the best tests of the reasonableness of rates under Section 1 is to compare the rates at issue with rates prescribed by this Commission or with rates established by the carriers with relation thereto."

Montgomery v. A. & S. Ry. Co., et al. (1928), 147 I. C. C. 415 (418):

"While comparisons with ratings established by the carriers are always of probative value in cases of this kind, the best comparisons are with ratings which have been prescribed by us."

Other decisions of the Commission to the same effect include:

Federated Metals Corp. v. Central R. R. Co. (1927), 126 I. C. C. 703 (709);

Illinois Electric Co. v. C. B. & Q. R. Co. (1928), 140 I. C. C. 63 (65).

In

Western Paper Makers' Chemical Co. v. U. S., supra,

the Supreme Court said (271 U. S., p. 271):

"Prior existing rates, whether locals or such proportionate rates from a key point to points of destination as were made applicable to this particular class of traffic, or direct rates upon other commodities moving from similar points of origin, are proper matters for consideration in establishing new through rates."

In

Montrose Oil Refining Co. v. St. L. & S. F. Ry. Co. (1927), 25 F. (2d) 750,

the Court said (752-753):

> "By comparing the charges for similar service and under similar conditions with the rates demanded and collected from the plaintiff, the Commission found the latter to be violative of the act in the respects complained of to the extent they exceeded 15.5 cents, and substantially, that the damage to the plaintiff resulted in the failure of the defendants to establish through routes and just and reasonable charges as provided in the act. Comparison of existing charges made under similar conditions has been recognized as a proper basis for fixing reasonable new rates. *Western Paper, etc., Co. v. United States,* 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941. It is inconceivable that this method may not be employed in determining whether a particular rate is reasonable or not, especially where, as here, none of the rates are attacked as being confiscatory * * *."

The obvious reason for the acceptance of Commission-made rates as the best possible standard of comparison, by which to judge other rates, is, of course, that a pronouncement by the Commission, approving or prescribing a particular rate as reasonable for future application to a particular service, constitutes that rate the *conclusive* measure of a rate or charge fulfilling the requirements of the Act. That principle is established by the controlling decisions of the Supreme Court, and particularly finds full recognition

in the *Arizona Case*. In the instant case, these comparisons with Commission-made and therefore conclusively reasonable rates to directly related points in the same destination territory, constitute a showing ample to overcome the mere *prima facie* case made by plaintiffs, even if it be assumed that the finding relied upon is *jurisdictionally* valid. The reparation finding in the *Third Phoenix Case*, even if assumed to have been jurisdictionally made so far as it deals with the rates to Tucson, creates a mere *prima facie* presumption, sufficient to enable plaintiffs to prevail only if no stronger opposing evidence is offered.

B. & O. Ry. Co. v. Brady, supra (288 U. S., p. 458);

Atlantic Coast Line R. Co. v. Smith Bros., supra (63 F. (2d), p. 748);

Blair v. C. C. C. & St. L. Ry. Co., supra (45 F. (2d), p. 793);

Southern Ry. Co. v. Eichler, supra (56 F. (2d), p. 1018).

On the other hand, opposed to that *prima facie* presumption (if in this case it exists), defendants present these comparisons with rates which have been prescribed or approved to these other directly related points, and therefore are *conclusively* presumed to have been just and reasonable. The reparation finding and orders upon which plaintiffs depend, considered as evidence, are inconsistent with the findings and orders in which the compared rates were approved or prescribed. The former have merely *prima facie* effect; but the latter are *conclusive*. Under established rules of evidence, the latter must prevail,

and the presumption created in plaintiffs' favor, even assuming the reparation finding to have been jurisdictionally made, is completely rebutted and overthrown.

The most forceful and direct comparison appearing on Exhibit F is between the rates as charged on plaintiffs' shipments, and the rate to Phoenix, prescribed in the *First Phoenix Case.* The order in that case was effective until February 25, 1925, and thus for a substantial portion of the reparation period in the instant case. In fact, 21 out of the 41 shipments upon which reparation is sought originated prior to February 25, 1925 (R. 37, 49-50), and all but three of the remaining 20 moving during 1925, but after February. Under the decision in the *Arizona Case,* the 96½-cent rate was *conclusively* established during the period prior to February 25, 1925, as the reasonable maximum rate to Phoenix, for hauls from 80 to 100 miles less, on the average, than the hauls to Tucson. The rates charged on plaintiffs' shipments were *less* than the reasonable maximum rate prescribed for the shorter hauls to Phoenix. The rates actually maintained at Tucson, after September 17, 1921, and until February 25, 1925, were the same as at Phoenix (R. 14-15). The rate-basis prescribed for reparation purposes was, however, *higher* at Tucson. It is plain that the same standards of reasonableness should be used in determining the rates to both points; and since 96½ cents was the conclusively reasonable rate to Phoenix, the much lower rates charged on the Tucson shipments were also conclusively reasonable.

Defendants proposed appropriate findings of fact, conforming to their showing (Proposed Findings Nos. 13, 14, 15, and 16: R. 242-247). These findings were rejected by the trial Court (R. 247), and were thereupon made the subject of exceptions, and appropriate assignments of error (Assignments Nos. 14, 15, 16, and 17). We ask this Court to sustain these assignments, and to conclude that the trial Court, in failing to adopt the proposed findings, or other findings conforming to the *conclusive* proof made by defendants, has committed material error requiring the reversal of the judgments.

CONCLUSION.

The judgments from which the instant appeals have been taken should be reversed, because of three fundamental errors committed by the trial Court:

First, its erroneous recognition of the *Eagle Case* as the controlling authority upon the question of the Commission's jurisdiction to make the finding and orders upon which the suits are based; and its failure to recognize that that case was disapproved in principle, and in effect overruled, by the Supreme Court in the *Arizona Case,* and that the *Arizona Case* and the *Wholesale Grocery Case* are the controlling authorities upon the jurisdictional issue;

Second, its error in according *prima facie* evidentiary value to the reparation finding and orders in suit; and its failure to recognize that the finding and

orders are based upon the *same* misconceptions of law, by the Commission, which invalidated the *same* finding, and the orders based thereon, when reviewed in the *Arizona* and *Wholesale Grocery Cases,* and that the Commission's error of law pervades the entire finding, and renders it of no evidentiary value in these suits; and

Third, its error in failing to recognize the decisions in the *Arizona Case* and the *Wholesale Grocery Case* as having conclusively determined the lawful measure of the reasonable rates to be charged, not only to the destinations involved in those cases, but also to the adjacent and related destination involved in the instant cases.

We ask this Court to conclude that the trial Court erred *as a matter of law* in concluding, upon the undisputed facts, that the Commission had valid jurisdiction to make the reparation awards here in suit; and to conclude further that, even if the Commission possessed such jurisdiction, *in the abstract,* the finding and orders here in suit, being predicated upon a demonstrated error of law by the Commission, afford no satisfactory evidence upon which to base the trial Court's finding and conclusion that the rates under attack were unreasonable or otherwise unlawful, and that the trial Court therefore erred in adopting findings and conclusions unsupported by satisfactory evidence, and in fact opposed to the conclusive showing presented by defendants.

The judgments should be reversed, and the causes remanded with instructions to enter judgments for defendants.

Respectfully submitted,

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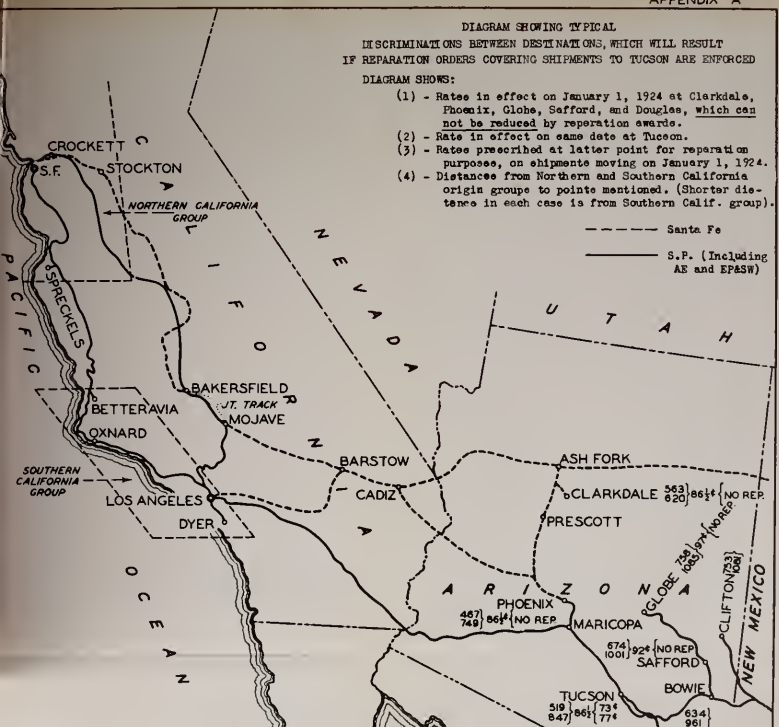
Dated, San Francisco, California,
September 25, 1934.

(Appendix Follows.)

Appendix.



NOTE: - Railroad lines shown are those in existence January 1, 1924.

Distances to Tucson and other points in Southeastern Arizona, from Northern California, are computed via Mojave, Barstow, Cadiz, Phoenix, and Maricopa, thence S.P. and connections to destination, as in the report of the Third Phoenix Case. That route was not open under the tariffs. Distances via actually used routes were substantially greater.

(a) - In Docket 11532, 62 ICC 412, the Commission prescribed a rate of 96-1/2¢ for the future, from all California points to Phoenix. The 86-1/2¢ rate shown represents this 96-1/2¢ rate, as reduced 10%, July 1, 1922. In the Arizona Grocery Case, 284 US 370, the Supreme Court held that no reparation could be awarded against rates maintained in compliance with the order in Docket 11532.

(b) - In Docket 13139, 81 ICC 134, the Commission found not unreasonable the current rates on sugar from all California points to Globe, Safford, and other Globe Branch points. The rates shown at those two points represent voluntary reductions below the basis approved. In the Wholesale Grocery Case, 68 F. (2) 601, the Circuit Court of Appeals held that no reparation could be awarded against rates equal to or less than those thus approved.

(c) - In Docket 14011, 88 ICC 5, the Commission found not unreasonable the current rate on sugar from all California points to Clerkdale. The 86-1/2¢ rate shown is the rate thus approved. In Miller Co. vs A.T.& S.F. Ry. Co., No. L-824 Phx, the U.S.District Court for Arizona held that no reparation could be awarded against the rate thus approved.

(d) - In Docket 11442, 64 ICC 405, the Commision found not unreasonable the current (1921) rate on sugar from all California points to Douglas. The 86-1/2¢ rate shown represents the approved rate, as reduced 10%, July 1, 1922. Under the rule of the Wholesale Grocery Case, no reparation can be awarded against rates lower than the rate thus approved.